91-1162

No.

Supreme Court, U.S.
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IN THE

# Supreme Court Of The United States

October Term, 1991

SID GOODMAN & COMPANY, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the "implied duty clause" of the Perishable Agricultural Commodities Act ("PACA"), which prohibits a PACA licensee's "*fail[ure]* . . . to *perform* any . . . duty, express or implied," may also be interpreted to prohibit a "fail[ure]" to "*refrain*" from "corrupting" a licensee's customer's employees, in effect turning the clause into an unlimited prohibition against all unfair trade practices in the industry?

2. Whether, in the context of a federal regulatory scheme affecting over 15,000 licensees, the Department of Agriculture has absolute discretion to formulate and apply a concededly new interpretation of PACA's "implied duty clause" for the first time in a PACA license revocation proceeding?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES AND REGULATIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 8 |
| I. THE PROPER INTERPRETATION OF PACA'S IMPLIED DUTY CLAUSE IS AN IMPORTANT QUESTION OF FEDERAL LAW. THIS COURT'S REVIEW NOW, OF THE DEPARTMENT'S NOVEL AND IMPROPERLY SWEEPING INTERPRETATION OF THAT CLAUSE, IS NECESSARY TO AVOID HAVING PETITIONER AND OTHER PACA LICENSEES PUT OUT OF BUSINESS ON GROUNDS NEVER AUTHORIZED BY CONGRESS | 8 |
| II. THIS COURT'S REVIEW IS NEEDED TO CLARIFY AND ENFORCE THE MANDATE IN *SEC V. CHENERY*, 332 U.S. 194 (1947), THAT, IN "FILLING IN THE INTERSTICES OF [AN] ACT," ADMINISTRATIVE AGENCIES MUST PROCEED "*AS MUCH AS POSSIBLE*" BY RULEMAKING RATHER THAN ADJUDICATION | 17 |
| CONCLUSION | 23 |

## TABLE OF AUTHORITIES


| CASES | PAGE(S) |
|---|---|
| *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939) . . . . . | 15 |
| *Arcadia v. Ohio Power Co.*, 498 U.S. ___, 111 S. Ct. 415 (1990), *reh'g denied*, ___U.S.___, 111 S. Ct. 804 (1991) . . . . . | 16 |
| *Barry v. Barchi*, 443 U.S. 55 (1979) . . . . . | 20 |
| *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984) . . . . . | 12 |
| *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) . . . . . | 11 |
| *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982) . . . . . | 21, 22 |
| *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974) . . . . . | 4 |
| *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976) . . . . . | 15 |
| *Hughey v. United States*, 495 U.S. 411 (1990) . . . | 12 |
| *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987) . . | 13 |
| *Iwata v. Western Fruit Growers, Inc.*, 90 F.2d 575 (9th Cir. 1937) . . . . . | 14 |
| *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990) . . . . . | 11, 14 |
| *Kossick v. United Fruit Co.*, 365 U.S. 731, *reh'g denied*, 366 U.S. 941 (1961) . . . . . | 9 |

PAGE(S)

*M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614 (1946) . . . . . 12

*Mallard v. United States*, 490 U.S. 296 (1989) . . . 11

*Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S.___, 111 S. Ct. 1171 (1991) . . . . . 17, 18

*Morton v. Ruiz*, 415 U.S. 199 (1974) . . . . . 20

*National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978) . . . . . 9

*NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) . . . . . 18, 20, 21

*NLRB v. Enterprise Ass'n*, 429 U.S. 507 (1977) . . 8

*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) . . . . . 18

*Patterson v. Lamb*, 329 U.S. 539 (1947) . . . . . 9

*Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) . . . . . 14, 15

*Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) . . . . . 13, 14

*SEC v. Chenery Corp.*, 332 U.S. 194 (1947) . . . . *passim*

*In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (Sept. 26, 1990) . . . . . 2

*Sid Goodman & Co. v. United States*, No. 90-2209, slip op. (4th Cir. Oct. 1, 1991) . . . . . 3

*Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987) . . . 21

*In re Tipco, Inc.*, PACA Dkt. No. 89-528, ALJ's Initial Decision and Order (April 6, 1990) . . 6, 16

*In re Tipco, Inc.*, 50 Agric. Dec. 871 (Feb. 6, 1991) . . . . . 6, 9

PAGE(S)

*Tipco, Inc. v. USDA*, No. 91-1435 (4th Cir., filed March 4, 1991) . . . . . 6

*United States v. Donovan*, 429 U.S. 413 (1977) . . 9

*United States v. Rust Communications Group, Inc.*, 425 F. Supp. 1029 (E.D. Va. 1976) . . . . . 12

*In re Wiley Prentice*, 47 Agric. Dec. 1655 (1988) . . . . . 22

**STATUTES, REGULATIONS, AND RULES**

5 U.S.C. § 553 . . . . . 22

5 U.S.C. § 558 . . . . . 6

5 U.S.C. § 706 . . . . . 3, 18

7 U.S.C. § 227 . . . . . 15, 16

7 U.S.C. § 499b . . . . . *passim*

7 U.S.C. § 499h . . . . . 6

7 U.S.C. § 499o . . . . . 20

15 U.S.C. § 13(c) . . . . . 15

15 U.S.C. § 45(a) . . . . . 15

28 U.S.C. § 1254(1) . . . . . 2

28 U.S.C. § 2342(2) . . . . . 2, 7

28 U.S.C. § 2343 . . . . . 7

28 U.S.C. § 2344 . . . . . 7

42 U.S.C. § 1981 . . . . . 15

7 C.F.R. § 46.26 . . . . . 3, 21

9 C.F.R. § 203.5 . . . . . 20

9 C.F.R. § 203.14 . . . . . 20

Va. Code Ann. § 18.2-444(1) (Michie Supp. 1991) . . . . . 15

PAGE(S)

Fed. R. App. P. 15(a) . . . . . 7
Sup. Ct. R. 10.1(c) . . . . . 8, 10

**MISCELLANEOUS**

44 Fed. Reg. 37322 (June 26, 1979) . . . . . 20

H.R. Rep. No. 794, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 1536 . . . . 9

H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942) . . . . . 14

10 Dr. Neil E. Harl, *Agricultural Law* (1989) . . . 4

Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, Regulation, July-Aug. 1981 . . . . . 17

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sid Goodman & Co., Inc., prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 1, 1991.[1]

## OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reprinted in Petitioner's Appendix ("Pet. App.") at 2a. The opinion of the Judicial Officer of the United States Department

[1] All parties are named in the caption. Sid Goodman & Co., Inc. has no parent companies, subsidiaries or affiliates.

of Agriculture (the "Department") is reported at 49 Agric. Dec. 1169, and is reprinted in Pet. App. at 15a. The opinion of the Administrative Law Judge ("ALJ") of the Department is unpublished and is reprinted in Pet. App. at 45a.

## JURISDICTION

On October 25, 1990, Sid Goodman & Co. filed a Petition pursuant to 28 U.S.C. § 2342(2) in the United States Court of Appeals for the Fourth Circuit seeking review of the Department's Order of September 26, 1990, revoking Sid Goodman & Co.'s license under the Perishable Agricultural Commodities Act.[2] On October 1, 1991, a panel of the United States Court of Appeals affirmed the Department's Order. On November 5, 1991, that panel also denied a timely petition for rehearing and the full court denied a suggestion for rehearing *en banc*. Pet. App. 1a. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The relevant portion of Section 2(4) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499b(4) is as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce —
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce

[2] The caption in the United States Court of Appeals for the Fourth Circuit named as a Respondent Clayton Yeutter, in his official capacity as Secretary of the United States Department of Agriculture. Since that time, Mr. Yeutter has been replaced by Edward Madigan, and the caption accordingly reflects this change.

> by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title.

The full text of Section 499b is printed in Pet. App. at 80a. This case also involves Section 10(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which is printed in Pet. App. at 75a. The regulation involved in this case is 7 C.F.R. § 46.26 (1991), which is printed in Pet. App. at 83a.

## STATEMENT OF THE CASE

This is an action by the Department to revoke the PACA license issued to Sid Goodman & Co., a small family business which operates a wholesale fruit and vegetable dealership at the produce market in Jessup, Maryland.[3]

PACA licensees are required, *inter alia*, to "account" for the disposition, by sale or otherwise, of all goods received "on consignment" and to make "prompt payment" of the profit

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[3] Sid Goodman & Co.'s initial PACA license was issued in January 1980 and has been renewed annually. Prior to this proceeding, there is no evidence of any complaints against Sid Goodman & Co. for any violations of PACA. Testimony of James Bright, Department Marketing Specialist, *In re Sid Goodman & Co.*, PACA Dkt. No. 89-523, Transcript of Proceedings before the ALJ ("Tr.") at 61-62 (reprinted in Joint Appendix ("JA") in *Sid Goodman & Co. v. United States*, No. 90-2209 at 124-25).

realized by selling the consignee's goods.[4] In July 1988, the Department investigated a complaint by M. Offutt, who had shipped produce to Sid Goodman & Co. "on consignment." Pet. App. 3a. Specifically, Offutt had questioned the returns and accounting on five lots of melons.[5]

[4] "PACA was originally enacted by Congress in 1930 for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables. The essential need for regulation arose in the unfair activities of commission merchants, dealers and brokers who received shipments from growers and shippers. Upon receiving a shipment of perishable commodities, the commission merchants, dealers and brokers would wrongfully reject the shipment, in many cases making the false claim that the commodities had arrived in a damaged condition or some other claim permitting rejection of the shipment. These fraudulent rejections were made when the market for the commodity was declining so that the commission merchant, dealer or broker would have suffered a loss had he accepted the shipment and paid the contract price. Essentially the Act provides a system of licensing and penalties for violations." *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 990 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974) (citations omitted). "The . . . Act regulates individuals, partnerships, corporations and associations that do business as commission merchants, dealers, or brokers in perishable agricultural commodities in interstate or foreign commerce. A perishable agricultural commodity includes fresh, frozen and iced fruits and vegetables of every kind and character, and cherries in brine. A commission merchant is a person who receives covered commodities for the purposes of sale for or on behalf of another, and who receives a commission for the service. Persons who buy or sell such commodities in wholesale or jobbing quantities, as those terms are defined by the Secretary, are considered to be dealers." 10 Dr. Neil E. Harl, *Agricultural Law* § 72.02 (1989) (footnotes omitted). "The Perishable Agricultural Commodities Act is enforced by the Secretary of Agriculture. Through delegations of authority, the operating agency currently responsible for the daily administration of the program is the Regulatory Branch of the Fruit and Vegetable Division of the Agricultural Marketing Service." *Id.* § 72.01[3] (footnotes omitted).

[5] During this investigation, the employees at Sid Goodman & Co. willingly permitted access to all relevant records. Testimony of James Bright, Tr. at 17, 63 (JA at 80, 126). When the investigation concluded that there had been an underpayment to Offutt, Sid Goodman & Co. promptly gave the

(Continued on Page 5)

During the course of its investigation, the Department discovered that, in some cases, Sid Goodman & Co. had made undisclosed payments of 25 cents per package to purchasing agents of its retail customers. In a complaint filed April 18, 1989, the Department alleged that, in making these payments, Sid Goodman & Co. had violated the PACA, 7 U.S.C. § 499b(4).

The original complaint alleged only that Petitioner had violated Section 2(4) of PACA.[6] Not until more than three months later, and then only after repeated orders for clarification, did the Department finally reveal its theory of its case: that if it were proven that Sid Goodman & Co. had given "money or something of value to employees of . . . its customers to induce those employees to make purchases from it on behalf of their employers without informing the employers of this arrangement," the Department would consider this conduct a violation of the "first three unnumbered clauses" of 7 U.S.C. § 499b.[7] The first of these clauses prohibits the making of "false or misleading statements." The second prohibits a failure to "account" or make full "payment." The so-called "implied duty" clause is the third of these clauses.

The Department was at least candid in admitting that the implied duty clause had never before been invoked in this manner, and that the questions of whether it even applied to Petitioner's conduct was a novel issue of first impression.[8]

(Continued from Page 4)

investigator a check for the amount due. Testimony of James Bright, Tr. at 29 (JA at 92). It is not clear from the record exactly what gave rise to the full underpayment.

[6] Complaint, *In re Sid Goodman & Co.*, PACA Dkt. No. 89-523, April 14, 1989 (JA at 6).

[7] Complainant's Response to "Request to Complaint Counsel," Aug. 9, 1989 at 2 (JA at 26).

[8] Complainant's Proposed Findings of Fact, Conclusions, and Order before the ALJ, Nov. 30, 1989 at 17 (JA at 28). In a companion case involving many of the same issues, the Department also charged another Maryland

(Continued on Page 6)

An oral hearing was held before the Department's ALJ. There was considerable and conflicting evidence introduced at the hearing with respect to what the managements of Sid Goodman & Co.'s retail customers knew about such payments.[9]

On February 28, 1990, the ALJ filed his Initial Decision and Order permanently revoking Petitioner's license.[10] On May 2, 1990, Petitioner appealed to the Department's Judicial Officer. On September 26, 1990, the Judicial Officer adopted the ALJ's Initial Decision and Order, with only minor changes and some additional conclusions.

The Judicial Officer held that the payments by Sid Goodman & Co. were not disclosed to the purchasing agent's employer and that this had resulted in violations of the "false statements," "failure to account" and "implied duty" clauses of

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produce wholesaler with violating the implied duty clause as a result of making undisclosed payments to one of the same individual customer employees to whom Sid Goodman & Co. had made such payments. *In re Tipco, Inc.*, PACA Dkt. No. 89-528. In *Tipco*, the Department revoked Tipco's license for violations of the false statements and implied duty clauses of Section 499b(4). *In re Tipco, Inc.*, 50 Agric. Dec. 871 (Feb. 6, 1991). Tipco has sought review of this decision in the United States Court of Appeals for the Fourth Circuit, and is currently awaiting a decision. *Tipco, Inc. v. USDA*, No. 91-1435 (4th Cir., filed March 4, 1991).

[9] In *Tipco*, the ALJ found that management of one of the same retail customers involved in this case was aware of such payments. *In re Tipco, Inc.*, PACA Dkt. No. 89-528, ALJ's Initial Decision and Order at 22-29 (April 6, 1990) (JA at 415-422). There was absolutely no evidence that Sid Goodman & Co.'s payments had any actual effect on the decisions of the purchasing agents.

[10] Under 7 U.S.C. § 499h, the Department may suspend a license for a period not to exceed 90 days for violations of the Act. If the violation is "flagrant" and "repeated" (and if the willfulness requirement of 5 U.S.C. § 558 is met), the license may be revoked. Sid Goodman & Co.'s arguments that its conduct was not flagrant, repeated, nor willful were rejected by the court of appeals. Although not conceding the correctness of these rulings, Sid Goodman & Co. does not seek review of those issues in this Court.

Section 499b(4). The Petition for Review was filed in the court of appeals on October 25, 1990, pursuant to 28 U.S.C. §§ 2342(2), 2343, 2344 and Rule 15(a) of the Federal Rules of Appellate Procedure.

The court of appeals upheld the Judicial Officer's holding. With respect to the implied duty clause, the court purported to defer to the Department's construction, and yet, as noted below, actually interpreted the clause more broadly and without ever addressing Sid Goodman & Co.'s "plain meaning" argument. Pet. App. 7a, 8a, 10a. With respect to Sid Goodman & Co.'s argument that the Department should have proceeded by rulemaking rather than adjudication, the court merely stated that an agency is "free" to interpret its governing statutes on a case-by-case basis. Pet. App. 12a.[11] The panel declined to rehear

[11] In addition to the questions presented here, Sid Goodman & Co. made a number of other arguments before the Department and in the court of appeals, including: (1) that Congress never intended that the transactions between Sid Goodman & Co. and its *retail* customers would be subject to PACA regulation; (2) that the Department's construction of the implied duty clause violated the void for vagueness doctrine; (3) that the invoices submitted to Sid Goodman & Co.'s retail customers disclosed the actual price to be paid by the retailer and therefore were not "false or misleading" merely because they did not disclose payments to the customer's purchasing agent; and (4) that Sid Goodman & Co.'s accounting and payments to Offutt properly reflected the final amounts actually realized by Sid Goodman & Co. from the sale of the consignor's produce. The court of appeals rejected these arguments.

Sid Goodman & Co. does not concede here that the Department or the court of appeals was correct in rejecting any of its arguments. However, Sid Goodman & Co. recognizes that, unlike the questions which *are* being presented by this petition, these other issues do not have the degree of importance which is generally required to merit review by this Court. Nevertheless, the rulings on the false statement and failure to account violations do not eliminate the need for review in this Court. Upon questioning at oral argument, counsel for the Department conceded that if the alleged violation of the "implied duty clause" of Section 499b(4) were not sustained,

(Continued on Page 8)

the rulemaking argument, and the full court declined to hear the issue *en banc*, on November 5, 1991.

## REASONS FOR GRANTING THE WRIT

### I. THE PROPER INTERPRETATION OF PACA'S IMPLIED DUTY CLAUSE IS AN IMPORTANT QUESTION OF FEDERAL LAW. THIS COURT'S REVIEW NOW, OF THE DEPARTMENT'S NOVEL AND IMPROPERLY SWEEPING INTERPRETATION OF THAT CLAUSE, IS NECESSARY TO AVOID HAVING PETITIONER AND OTHER PACA LICENSEES PUT OUT OF BUSINESS ON GROUNDS NEVER AUTHORIZED BY CONGRESS.

Review on writ of certiorari is appropriate where "a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). There is no dispute among the parties as to the importance of the first question presented here.

The government itself argued below that the "scope of the implied duties clause is an issue of *great* importance to the Department of Agriculture and to the administration of the PACA [and that] the PACA has national application and effect."

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(Continued from Page 7)

a remand to the Department would be required so that the Department could consider the correctness of imposing the drastic sanction of permanent license revocation based only on the "false statement" and "failure to account" violations. *See NLRB v. Enterprise Ass'n*, 429 U.S. 507, 522 n.9 (1977) (when there have been errors of law, the duty of reviewing courts is generally to remand the case to the agency to allow the receipt and examination of evidence in light of the legal correction); *SEC v. Chenery*, 332 U.S. 194, 196-97 (1947) (reviewing court may not presume, when finding improper grounds were used as the basis for the administrative decision, that the administrator would have made the same decision on other, valid grounds).

Pet. App. 87a.[12] In the companion *Tipco* case, the Judicial Officer revoked the Tipco license, noting his concern that holding otherwise would not send the right "message" to "this multi-billion dollar industry." *Tipco*, 50 Agric. Dec. at 908. Thus, it is also clear that the proper resolution of the scope of PACA's implied duty clause is a matter of great importance, not only to the parties, but also to the more than 15,000 other PACA licensees, many of whom, like Sid Goodman & Co., are small businesses.[13] Indeed, given the pervasiveness of PACA's regulatory reach, like the issues reviewed on a writ of certiorari in *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978), the resolution of the scope of the implied duty clause is important "for the agricultural community." 436 U.S. at 820. *Accord Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (certiorari granted where issue also was important to thousands of similarly situated persons).

Review on a writ of certiorari is particularly appropriate where the issue is "the construction of a major federal statute," *United States v. Donovan*, 429 U.S. 413, 422 (1977), and where, as here, the government acknowledges that the opinion below "addresses an issue of first impression, marking the first instance in which a court of appeals has ruled on the scope of the PACA's implied duties clause." Pet. App. 86a; *Kossick v. United Fruit Co.*, 365 U.S. 731, 733, *reh'g denied*, 366 U.S. 941 (1961) (granting certiorari because it presented "novel questions" of law).

The absence of contrary decisions by other courts of appeals is not a reason to postpone resolution in this Court. Future consideration by other courts of appeals will add little, if anything, to the competing analyses offered now by the parties and

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[12] Letter from Leslie K. Lagomarcino, counsel for the Department, to John M. Greacen, Clerk of the Fourth Circuit (October 4, 1991), requesting that the court of appeals opinion be published (emphasis added).

[13] H.R. Rep. No. 794, 100th Cong., 2d Sess. 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1536, 1537.

by the decision of the Court of Appeals for the Fourth Circuit. Moreover, great hardships may result from a delay in reviewing the Department's interpretation.

If a writ is not granted now, the Department will continue to invoke its open-ended and unjustified interpretation of the implied duty clause. That interpretation could be used to put PACA licensees out of business for actions which Congress never intended to be the basis for license revocation. Nor is there any guarantee that there will soon be another occasion for this Court to correct the Department. Because many PACA licensees are individuals or small businesses, those adversely affected by the Department's improper use of the implied duty clause may not have the resources available that this Petitioner was forced to expend, first to challenge the Department's interpretation before the Department and in the court of appeals, and then to invoke this Court's jurisdiction. In summary, the scope of the PACA's implied duty clause is undeniably an "important question of federal law which has not been . . . settled by this Court." Sup. Ct. R. 10.1(c). The interests of PACA's more than 15,000 licensees and the fair and efficient administration of PACA would best be served by having this Court settle that question now.

### A. THE DEPARTMENT'S INTERPRETATION OF THE IMPLIED DUTY CLAUSE IS INCONSISTENT WITH THE CLEAR LANGUAGE OF SECTION 499b(4), IN WHICH CONGRESS ENUMERATED A SPECIFIC PROHIBITION AGAINST A "FAILURE" TO "PERFORM" DUTIES, NOT A BROAD PROHIBITION AGAINST UNFAIR TRADE PRACTICES GENERALLY.

The implied duty clause prohibits licensees from "fail[ing] . . . to perform any specification or duty, express or implied." 7 U.S.C. § 499b(4). Both the Judicial Officer and the court of

appeals held that the implied duty clause prohibits PACA licensees from making the kinds of payments at issue in this case. The Judicial Officer held that such behavior violates a licensee's "implied duty not to corrupt the employees of its customers." Pet. App. 30a, 43a. In upholding the Judicial Officer, the court of appeals stated, in even broader terms, that the implied duty clause imposes "a duty to deal fairly," and encompasses "all unlawful transactions without exception." Pet. App. 10a, 7a. Both constructions pervert the plain language and structure of the statute, and, contrary to Congressional intent, would unjustifiably transform this clause into an all-encompassing prohibition against any and all unfair trade practices.

As this Court has stated, "[t]he starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1575 (1990) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *accord Mallard v. United States*, 490 U.S. 296 (1989). Congress used language in the implied duty clause which does not purport to prohibit *any* affirmative conduct at all. The implied duty clause authorizes revocation of a PACA license only if the licensee "*fail[s]* . . . to *perform*" express or implied duties. 7 U.S.C. § 499b(4) (emphasis added). In other words, the clause *requires* that licensees "perform" their affirmative duties. Those licensees who "*fail*" to "perform" those duties are then subjected to license revocation.

The language of Section 499b(4), in and of itself, simply cannot fairly be read to *prohibit* licensees from "performing" affirmative acts. Nevertheless, the Department and the court of appeals have twisted this plain language to prohibit affirmative acts. In order to fit this prohibition into the language of PACA, the Judicial Officer was forced to conclude that Sid Goodman

& Co. had failed to "perform" a *negative* implied duty – *i.e.*, that Sid Goodman & Co. had failed to perform "the implied duty not to corrupt the employees of its customers." Pet. App. 30a, 43a.[14] This construction is inconsistent with explicit statutory language and cannot be permitted to stand.[15]

### B. THE DEPARTMENT'S INTERPRETATION IS CONTRADICTED BY THE HIGHLY SPECIFIC LANGUAGE AND STRUCTURE OF SECTION 499b.

The structure of Section 499b and the language of the implied duty clause itself, one of the many specific prohibitions in this Section, dictate that the clause cannot be transformed into a general prohibition. *See Hughey v. United States*, 495 U.S. 411, 110 S. Ct. 1979, 1984 (1990) (the principle of *ejusdem generis* dictates "that a general statutory term should be understood in light of the specific terms that surround it").

The language of the seven subsections of Section 499b contains no industry-wide prohibitions against generally "unfair" or "unlawful" conduct. Rather, each of the subsections deals with very specific types of conduct peculiar to the perishable agricultural commodities industry, *e.g.*, the weighing, grad-

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[14] Without any discussion of the Judicial Officer's construction (although claiming deference to that construction), as noted above, the court of appeals recharacterized the implied duty as the "implied duty to deal fairly," prohibiting PACA licensees from engaging in "all unlawful transactions." Pet. App. 10a, 12a.

[15] While some deference is ordinarily owed to an agency's construction of the statutes which it administers, this Court will not let stand a construction which is impermissible or contrary to Congressional intent. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, *reh'g denied*, 468 U.S. 1227 (1984). In addition, less deference is due an agency's construction where, as here, the agency's action is penal in nature. *United States v. Rust Communications Group, Inc.*, 425 F. Supp. 1029, 1033 (E.D. Va. 1976) (citing *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 621-22 (1946)).

ing, and discarding of produce.[16] While the first subsection prohibits licensees from "engag[ing] in any unfair, unreasonable, discriminatory, or deceptive practice *in connection with the weighing, counting, or in any way determining the quantity* of any perishable agricultural commodity," 7 U.S.C. § 499b(1) (emphasis added), none of the subsections prohibits simply *general* "unfair practices."

The implied duty clause addresses the making of false statements, the failure to account and make payment, and the failure to perform express and implied duties. It contains no broad "unfair practices" language or even the kind of narrowly-focused "unfair" practice language actually contained in subsection 499b(1) discussed above. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987) (citations omitted).

As this Court has stated, under similar circumstances, "[e]ven if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

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[16] Specifically, the seven subsections of Section 499b address: (1) weighing produce; (2) rejecting or failing to deliver produce; (3) discarding, dumping or destroying produce; (4) making false statements, failing to account or pay, or failing to perform an implied duty in produce transactions; (5) misrepresenting the grading of produce; (6) tampering with the grading or labelling of produce; and (7) post-inspection substitution of produce lots. The full text of the subsection is set out in Pet. App. at 80a.

### C. NOTHING IN THE LEGISLATIVE HISTORY OF THE IMPLIED DUTY CLAUSE SUPPORTS THE DEPARTMENT'S INTERPRETATION.

The legislative history of the implied duty clause does not reflect the "clearly expressed legislative intent to the contrary" necessary to overcome the plain language of the statute. *Kaiser Aluminum*, 110 S. Ct. at 1575. The implied duty clause was enacted in direct response to a court decision holding that PACA's requirement of rendering a prompt "account" did not include the obligation to make payment.[17] As the Congress itself recognized, allowing that decision to stand would have nullified a core purpose of PACA – to ensure that produce growers received accounting and payment from distant wholesale merchants. H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942). There is absolutely no indication that, in preventing an attempted judicial emasculation of the prompt accounting provision, Congress intended to give the Department *carte blanche* to use its life or death licensure authority to remedy any ill that the Department might find anywhere in the produce industry.

### D. PUBLIC POLICY NEITHER CAN NOR DOES JUSTIFY THE DEPARTMENT'S INTERPRETATION.

No matter what policy arguments may support it, the Department's and the court of appeals' inverted interpretation cannot stand because it transforms the implied duty clause into exactly the kind of catch-all provision which Congress did not include in subsection (4). *See Pavelic & LeFlore*, 493 U.S. at 126. Even if they were applicable, any policy arguments in support of the Department's construction of the implied duty clause fail in the face of the laws which specifically address the kinds of payments that the Department found occurred in this case. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

[17] *Iwata v. Western Fruit Growers, Inc.*, 90 F.2d 575 (9th Cir. 1937).

In *Patterson*, this Court interpreted literally the rights to "make" and "enforce" contracts under 42 U.S.C. § 1981, noting that the conduct to which the petitioner sought to extend the section was already addressed by state contract law and Title VII. 491 U.S. at 177. This Court concluded that the availability of Title VII relief "should deter us from a tortuous construction of [§ 1981] to cover this type of claim." 491 U.S. at 181. The Department should similarly have been deterred from adopting its broad interpretation of the implied duty clause, given that it conceded that the kinds of payments that occurred in this case have been held to be punishable under state law,[18] the FTC Act,[19] and the Robinson-Patman Act.[20] Pet. App. 33a-34a.

There is no evidence that Congress intended to duplicate the prohibitions contained in these broader trade laws. When Congress enacted the Packers & Stockyards Act of 1921 – which prohibits engaging in any "unfair, unjustly discriminatory, or deceptive practice" in that industry – Congress explicitly exempted the packers and stockyards industry from regulation under the FTC Act. 7 U.S.C. § 227(a)(1); 15 U.S.C. § 45(a)(2). Subsequent amendments clarified that Congress' intent was "to avoid unnecessary duplication of effort by the Government and burdens on the [packers and stockyards] in-

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[18] *See, e.g.*, Va. Code Ann. 18.2-444(1) (Michie Supp. 1991) (making guilty of a misdemeanor "[a]ny person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence his action to the prejudice of his principal's, employer's or master's business").

[19] 15 U.S.C. § 45(a)(1) (prohibiting "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices"); *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939).

[20] 15 U.S.C. § 13(c) (making it unlawful "to pay or grant, or to receive or accept anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods"); *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976).

dustry." 7 U.S.C. § 227(a)(2).[21] The lack of a similar provision under PACA addressing FTC and Department division of responsibility reflects a corresponding lack of Congressional intent to create a general unfair trade practice prohibition under PACA.[22] The implied duty clause cannot be interpreted to create one.[23]

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[21] The amendments to 7 U.S.C. § 227 allow FTC investigations in the packers and stockyards industry where the FTC determines that without such investigation, "effective exercise of its power . . . will be impaired." 7 U.S.C. § 227(a)(2). Nevertheless, the statute still maintains that the FTC must notify the Department of Agriculture of its intent to investigate. If the Department notifies the FTC within ten days that there is a pending investigation of the same subject matter, the FTC may not proceed with its own investigation.

[22] Although he eventually reached the opposite conclusion, even the ALJ in *Tipco* recognized that "it could be inferred that the Congress, to avoid having a proliferation of laws and agencies dealing with unfair and deceptive commercial practices, intended that only specific laws and agencies deal with this matter." *In re Tipco, Inc.*, PACA Dkt. No. 89-528, ALJ's Initial Decision and Order at 19 (April 6, 1990) (JA at 412).

[23] The fact that the implied duty clause has never before been interpreted in this manner, in the nearly 50 years since its enactment, reinforces the error in the Department's construction. *Arcadia v. Ohio Power Co.*, 498 U.S. ___, 111 S. Ct. 415, 420 (1990), *reh'g denied*, ___ U.S. ___, 111 S. Ct. 804 (1991) (rejecting a similar attempt to invoke an alleged catch-all provision, noting that "in 50 years of administering the Federal Power Act, FERC and its predecessor, the FPC, have never decided an issue under § 318 except in connection with orders promulgated under those four sections [preceding the alleged catch-all provision]. Never before this case has § 318 been used as a general conflicts provision").

## II. THIS COURT'S REVIEW IS NEEDED TO CLARIFY AND ENFORCE THE MANDATE IN *SEC V. CHENERY*, 332 U.S. 194 (1947), THAT, IN "FILLING IN THE INTERSTICES OF [AN] ACT," ADMINISTRATIVE AGENCIES MUST PROCEED "*AS MUCH AS POSSIBLE*" BY RULEMAKING RATHER THAN ADJUDICATION.

If this Court agrees that the Department's interpretation of the implied duty clause is improper, it need not reach the second question presented. However, that question is also deserving of this Court's review.

In *SEC v. Chenery*, 332 U.S. 194 (1947), this Court addressed how administrative agencies should deal with regulatory statutes when their proper administration required the agency to "fill . . . in the interstices of the Act." 332 U.S. at 202. Although this Court described certain situations in which it might be necessary to fill in these gaps in the course of adjudication, this Court also stressed that adjudication should be the exception: this "function . . . should be performed *as much as possible*, through . . . quasi-legislative promulgation of rules to be applied in the future." 332 U.S. at 202 (emphasis added).

While *Chenery* is most frequently cited for the proposition that, in the proper case, administrative agencies have the discretion to devise new rules in adjudicatory proceedings, neither this Court nor the courts of appeals have sufficiently clarified when and where that discretion ends. Petitioner fully recognizes the problems inherent in *defining* all of the situations in which adjudicative rulemaking may be necessary.[24] Nonetheless, this Court has never suggested that that discretion is unfettered. Indeed, as discussed in greater detail below, this Court has continued to indicate that it is *not* absolute. *Martin v. Occupa-*

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[24] Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, Regulation, July-Aug. 1981, at 25, 27.

*tional Safety and Health Review Comm'n*, 499 U.S. ___, 111 S. Ct. 1171, 1179 (1991); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

Whatever the exact outer limit of that discretion may be, when the Department adopted its novel interpretation of the implied duty clause in this adjudicatory proceeding, without even any explanation of why the Department could not have done so first in rulemaking, the Department transgressed that limit and abused its discretion in violation of Section 10(e)(2)(a) of the APA. 5 U.S.C. § 706(2)(a).

In *Chenery*, this Court properly required rulemaking *as much as possible*, yet here, there was no good reason why the Department could not have adopted its new interpretation of the implied duty clause in a rulemaking proceeding.[25]

### A. *CHENERY* LIMITS AGENCY DISCRETION TO APPLY NEW STATUTORY INTERPRETATIONS FOR THE FIRST TIME IN ADJUDICATORY PROCEEDINGS.

In *Chenery*, this Court noted that rulemaking was essentially not "possible" in a number of situations: (1) where the agency must reserve the power to respond to "unforeseeable situations"; (2) where the agency has had insufficient experience to warrant "rigidifying its tentative judgment into a hard and fast rule"; and (3) where the problem is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." 332 U.S. at 202-03. Therefore, "*[i]n those situations*, the agency must retain power to deal with the

[25] There was no risk of Sid Goodman & Co. getting a "free bite" at the apple. As noted above, the Department could have proceeded against Sid Goodman & Co. on the basis of the "false statements" or "failure to account" violations. The Department could also have sought to have Sid Goodman & Co. prosecuted under other acts that specifically prohibited "unfair" trade practices or such payments.

problems on a case-to-case basis if the administrative process is to be effective." *Id.* (emphasis added).

However, the Department was not in one of "those situations" described in *Chenery* when it chose to proceed by adjudication in adopting its admittedly novel interpretation of the implied duty clause.[26] Therefore, under *Chenery*, the

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[26] The Department cannot justifiably claim that the payments to purchasing agents that occurred here were unforeseeable in the produce industry. The Department had previously encountered similar allegations in the industry and had contemplated legal action against the alleged offender under PACA, presumably based upon the implied duty clause. Testimony of James Frazier, Assistant Chief of the PACA Branch of the Department, *In re Sid Goodman & Co.*, Transcript of Proceedings before the ALJ at 204-06 (JA at 226-28). Although the Department claims that a lack of evidence ultimately prevented it from instituting formal proceedings, this incident demonstrates that the Department was aware that such conduct did occur in the perishable agricultural commodities industry, that the Department interpreted PACA to prohibit such conduct, and that future disciplinary actions were therefore foreseeable. Therefore, the Department should have made public its interpretation of the scope of PACA and the implied duty clause through rulemaking under the APA.

The Department neither lacks experience with such payments nor holds only a tentative judgment as to their propriety. The fact that the Department had contemplated disciplinary action in the above mentioned case clearly indicates that the Department believed that such conduct violated PACA. Moreover, the Department had considerable experience in enforcing prohibitions against commercial bribery. Specifically, the Department has interpreted (and enforced) the unfair practices provision in the Packers & Stockyards Act to prohibit commercial bribery for many years. Pet. App. 33a. Therefore, there is no basis for arguing that the Department had reason to be reluctant in "rigidifying" through rulemaking its judgment that commercial bribery was prohibited by the implied duty clause.

Finally, the Department cannot claim that what it regards as "commercial bribery" is so specialized and varying in nature that it is incapable of being adequately defined in a rule. Commercial bribery has been clearly defined in other contexts, both by the Department and by others. Pet. App. 33a-34a. Under the Packers & Stockyards Act and the Federal Meat Inspection Act, the Department has, in fact, issued policy statements to clarify its position

(Continued on Page 20)

Department abused its discretion by failing to proceed by rulemaking.[27]

### B. THIS COURT HAS CONTINUED TO RECOGNIZE LIMITS ON ADJUDICATORY ANNOUNCEMENTS OF NEW STATUTORY INTERPRETATIONS.

Subsequent decisions by this Court have continued to recognize that rulemaking may be *required* in certain circumstances. In *Morton v. Ruiz*, 415 U.S. 199 (1974), this Court stated:

> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.

415 U.S. at 232. Like the beneficiaries in *Morton*, Sid Goodman & Co. has had an important property interest[28] denied in an adjudicative proceeding by the application of a novel statutory interpretation which had not previously been announced by the regulating agency.

In *NLRB v. Bell Aerospace Co.*, 416 U.S. at 294-95, this Court, although noting that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion," nevertheless clearly stated that "there may be situations

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(Continued from Page 19)

concerning the exchange of payments between purchaser and seller. 9 C.F.R. § 203.5; 9 C.F.R. § 203.14; 44 Fed. Reg. 37322 (June 26, 1979). Thus, *Chenery* mandates that similar regulatory prohibitions of commercial bribery under PACA should have been made.

[27] Under 7 U.S.C. § 499o, the "Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of [PACA]."

[28] *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (noting the property interest in a license).

where the Board's reliance on adjudication would amount to an abuse of discretion." 416 U.S. at 294. Such a situation did not exist in *Bell Aerospace* only because it was "doubtful whether any generalized standard could be framed which would have more than marginal utility." *Id.* Moreover, this Court suggested that agency discretion is even more limited where, as here, there are "fines or damages" resulting from the new statutory interpretation. 416 U.S. at 295.

### C. UNLIKE THE FOURTH CIRCUIT, OTHER CIRCUIT COURTS HAVE LIMITED AGENCY DISCRETION TO ANNOUNCE NEW STATUTORY INTERPRETATIONS IN ADJUDICATIONS.

Several courts of appeals have held that administrative agencies may not "change" statutory interpretations in adjudications. *Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987); *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). In *Stoller*, the operative statutory term was not defined, and there had been no prior disciplinary actions prohibiting such conduct.[29] So, from the perspective of the target, the agency had effectively "*change[d]* its view." *Stoller*, 834 F.2d at 266. In other words, in both *Stoller* and the immediate case, the "change" in policy was the establishment of a new requirement where there had been no prior statement of that requirement from statutory or regulatory sources. However, the Court of Appeals for the Fourth Circuit overlooked this in its initial opinion (and denied Sid Goodman & Co.'s Petition for

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[29] The Department conceded that no regulation directly addresses Sid Goodman & Co.'s conduct, but claimed that the "closest" regulation is 7 C.F.R. § 46.26 (1991). Testimony of James Frazier, Tr. at 207 (JA at 229). Section 46.26, however, essentially only repeats the language of the implied duty clause of Section 499b, providing that: "The responsibility is placed on each licensee to *fully perform* any specification or duty, express or implied, in connection with any transaction handled subject to the Act" (emphasis added) (full text reprinted in Pet. App. at 83a).

Rehearing specifically addressed to this point). Pet. App. 1a, 11a-12a. Similarly, in *Ford*, the Ninth Circuit has held that "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." *Ford*, 673 F.2d at 1009. The Department's transformation of the implied duty clause into a catch-all unfair trade practices provision obviously has widespread application in the perishable agricultural commodities industry.[30]

Even if this Court rejects the approaches taken in *Stoller* and *Ford*, or finds them somehow distinguishable, *Chenery* itself requires that the Department at least *consider* the choice between announcing a new rule by rulemaking or adjudication, and making a determination that rulemaking is not "*possible.*" Absent that requirement, neither *Chenery* nor *any* notion of a limit on agency discretion can have any meaning or effect.[31] In

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[30] Moreover, the fact that the court of appeals decision is unpublished does not affect the widespread application of this interpretation. The Judicial Officer's opinion has been published, and can be used as precedent in future Department adjudications. In addition, the fact that those in the Department are aware of the court of appeals opinion is likely to encourage broader and more frequent use of the implied duty clause to prohibit conduct not previously considered to be prohibited under PACA. .

[31] Even the Department's Judicial Officer has recognized the inherently arbitrary nature of announcing new interpretations in adjudication rather than rulemaking. *In re Wiley Prentice*, 47 Agric. Dec. 1655 (1988). The Judicial Officer held that the Department could not enforce its inspection program under the Plant Quarantine Act until the prohibitions thereunder were set forth in regulations. In an opinion that correctly identified the Department's attempted adjudicatory effort as a means of establishing a broad new public requirement, the Judicial Officer characterized the effort as regulatory in nature and held that:

> Under the Administrative Procedure Act (APA) (5 U.S.C. § 553), before a regulation is adopted imposing requirements on members of the public, the agency must engage in notice and comment rulemaking, giving the public an opportunity to be heard.

47 Agric. Dec. at 1682.

addition, if the minimum requirement for "consideration" is to be enforceable, the agency must, again at a minimum, create a record sufficient for reviewing courts to determine that the issue was properly considered. There is no dispute that neither of these requirements was met here. Thus, even if the Department's interpretation of the implied duty clause were permissible, at a minimum, under *Chenery*, the absence of any record of consideration of the possibility of establishing the Department's new "reverse" interpretation of the implied duty clause by rulemaking requires reversal of the decision of the court of appeals.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 1992

91-1162

(2)

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

No.

IN THE

# Supreme Court Of The United States

October Term, 1991

SID GOODMAN & COMPANY, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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89

## TABLE OF CONTENTS


| DOCUMENT | Page |
|---|---|
| Order of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing and Suggestion for Rehearing *En Banc* in *Sid Goodman & Co., Inc. v. United States* (filed November 5, 1991) | 1a |
| Opinion of the United States Court of Appeals for the Fourth Circuit in *Sid Goodman & Co., Inc. v. United States* (October 1, 1991) | 2a |
| Decision and Order of the United States Department of Agriculture Judicial Officer in *In re Sid Goodman & Co., Inc.* (September 26, 1990) | 15a |
| Initial Decision and Order of the United States Department of Agriculture Administrative Law Judge in *In re Sid Goodman & Co., Inc.* (February 28, 1990) | 45a |
| 5 U.S.C. § 706 | 75a |
| 7 U.S.C. § 192 | 76a |
| 7 U.S.C. § 227 | 77a |
| 7 U.S.C. § 499b | 80a |
| 7 C.F.R. § 46.26 | 83a |
| Letter from John M. Greacen, Clerk of the Fourth Circuit, to all counsel in *Sid Goodman & Co., Inc. v. United States*, noting the denial of the Department's Request that the panel's decision be published (November 6, 1991) | 84a |
| Letter from Leslie K. Lagomarcino, counsel for the Department, to John M. Greacen, Clerk of the Fourth Circuit, requesting that the panel's opinion in *Sid Goodman & Co., Inc. v. United States* be published (October 4, 1991) | 86a |

No. 90-2209

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

FILED: 11/5/91

SID GOODMAN & COMPANY,
INCORPORATED,

*Petitioner,*

versus

UNITED STATES OF AMERICA; UNITED
STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service;
CLAYTON YEUTTER, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE,

*Respondents.*

**ORDER**

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Niemeyer and Judge Young.

/s/ H. E. Widener, Jr.
For the Court

No. 90-2209

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SID GOODMAN & COMPANY,
INCORPORATED,

*Petitioner,*

v.

UNITED STATES OF AMERICA; UNITED
STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service;
CLAYTON YEUTTER, Secretary, U.S.
DEPARTMENT OF AGRICULTURE,

*Respondents.*

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On Petition for Review of an Order
of the United States Department of Agriculture
(89-523-D)

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Argued: May 6, 1991
Decided: October 1, 1991

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Before WIDENER, and NIEMEYER, Circuit Judges
and YOUNG, Senior United States District Court Judge for
the District of Maryland, sitting by designation.
Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Geoffrey Richard W. Smith, McDERMOTT, WILL & EMERY, Washington, D.C., for Petitioner. Leslie Karen Lagomarcino, Office of the General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington,

D.C., for Respondents. ON BRIEF: Edward M. Ruckert, Matthew C. Rosser, McDERMOTT, WILL & EMERY, Washington, D.C., for Petitioner. James Michael Kelly, Associate General Counsel, Raymond W. Fullerton, Assistant General Counsel, Margaret M. Breinholt, Deputy Assistant General Counsel, Office of the General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

## OPINION

PER CURIAM:

Goodman & Sons, Co. Inc. ("Goodman") is a Maryland corporation and a wholesale distributor of agricultural produce, located at the Maryland Wholesale Produce Market in Jessup, Maryland. Goodman is a licensed perishable agricultural commodities dealer, pursuant to the licensing requirements of the Perishable Agricultural Commodities Act ("PACA"). It purchases produce in wholesale lots from out-of-state shippers and sells the produce in wholesale quantities to customers in the District of Columbia and Baltimore areas. Goodman also accepts produce on consignment from out-of-state shippers and sells it on consignment in the District of Columbia and Baltimore areas. Magruder, Inc. ("Magruder") and Fresh Value, Inc. ("Fresh Value") are among Goodman's customers.

M. Offutt Co., Inc., a Texas produce shipper, requested that the Agricultural Marketing Service ("AMS") of the United States Department of Agriculture ("USDA") investigate Goodman's business, seeking reparation from Goodman for five lots of produce that Goodman handled for it on consignment.

The investigation uncovered accounting and reporting deficiencies that led to the discovery that Goodman "surreptitiously" made 25 cents per-package payments to the employees

of Magruder and Fresh Value, in order to induce those employees to purchase produce from Goodman rather than from a competitor.[1]

From January 1987 through September 1988, these payments to Bill Crandall, Assistant Vice President and Produce Buyer for Magruder, totalled more that $66,000 for the produce Crandall purchased from Goodman on behalf of Magruder's fourteen retail grocery stores. From April 1987 through September 1988, Goodman issued checks totalling $41,000 to the wife of Henry Hernandes, the produce buyer for Fresh Value's four retail supermarkets.

The supervisors at Fresh Value and Magruder were unaware of the payments. The invoices and accountings did not reflect the payments and Goodman clearly did not tell them. In addition, neither Crandall nor Hernandes reported to their superiors the payments received for purchasing the products. As a result of the investigation, AMS determined that Goodman had failed to make full and prompt payment to M. Offutt Co. of over $5000.[2]

Although both stores have policies forbidding employees from taking gifts or gratuities of any kind, there was evidence that employees of both stores received promotional gifts offered publicly by suppliers on an incentive basis to the retail food industry. These gifts included sports tickets, pens, bottles of wine, hats, and jackets.

On April 18, 1989, AMS issued a complaint against Goodman alleging that Goodman willfully, flagrantly, and repeatedly

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[1] Sales to Magruder indicated a 75 cents discrepancy between the invoice price and the price reported by Goodman to M. Offutt Co. Goodman received 25 cents more from the customer than it was reporting and paying to M. Offutt Co. This sum was given to the customers' employees to induce them to purchase produce from Goodman. Fifty cents was reported as freight costs.

[2] Goodman later compensated Offutt for this underpayment.

violated section 2(4) of the Act, 7 U.S.C. § 499b(4) by regularly and surreptitiously giving employees of two wholesale customers a total of more than $107,000 to induce those employees to buy perishable agricultural commodities from Goodman. On May 10, 1989, Goodman filed an answer denying violation of PACA and a motion for a more definite statement of the violations alleged. Goodman also asserted that Magruder and Fresh Value extorted the kickback payments by threatening not to purchase perishable agricultural commodities from Goodman if it did not make the per-package payments to their buyers.

In its more definite statement of the issues, the agency charged Goodman specifically with violations of the first three unnumbered clauses of section 2(4) of the PACA.[3] The complaint thus alleged that Goodman made fraudulent, false, or misleading statements in connection with transactions involving perishable agricultural commodities; failed or refused truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity; and failed to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

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[3] Section 499b provides in pertinent part:

It shall be unlawful in or in correction with any transaction in interstate or foreign commerce. . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title.

Following a hearing, the Administrative Law Judge ("ALJ") concluded that Goodman willfully violated section 2(4) of the PACA. The ALJ found that Goodman's reporting, accounting, and payment violations arose out of its surreptitious payments to the employees of its customers. He further found that Goodman violated the PACA (1) by making false statements on the invoices it submitted to its customers, Magruder and Fresh Value; (2) by making false statements in accounting to its consignors and by failing to account truly and correctly, or to make full payment promptly to those consignors; and (3) by failing to perform an implied duty owed by Goodman to its wholesale customers and by not informing those customers of the per-package kickback payments made to their employees. The ALJ ordered publication of these facts and also revoked Goodman's PACA license on the grounds that the violations were flagrant and repeated.

On May 2, 1990, Goodman appealed the ALJ's decision to USDA's Judicial Officer ("JO"). Goodman argued that the ALJ erred in concluding that section 2(4) of the PACA establishes an implied duty to refrain from making surreptitious kickback payments to employees of a PACA licensee's customers and that its due process rights were violated by the imposition of such a duty. Goodman also argued that the ALJ's findings of violations were not supported by substantial evidence on the record.

The JO adopted the ALJ's Decision and Order as final. Goodman filed a petition for review with this Court on September 25, 1990. By Order dated October 29, 1990, the JO stayed the revocation of Goodman's PACA license pending the outcome of the appeal.

I

Goodman does not contest that it marked up the price by 25 cents per-package on produce sold in wholesale lots to Magruder and Fresh Value. Nor does it dispute that it paid 25

cents per-package to the produce buyers employed by Magruder and Fresh Value in order to induce them to buy from Goodman rather than from a competitor. Further, Goodman admits that it concealed the mark-up from both Magruder and Fresh Value, and that it omitted the mark-up from the invoices it submitted to its consignor, M. Offutt Co. However, Goodman argues that the plain language of the statute makes no mention of payments, bribery or corruption and that the statute addresses omissions and not obligations.

The plain language of the statute is the point at which interpretation commences. *Mallard v. United States District Court,* 490 U.S. 296, (1989). The broad statutory language reflects the breadth of the PACA:

> It shall be unlawful in or in connection with *any transaction* in interstate or foreign commerce – ... (4). . . or to fail, without reasonable cause, to perform any specification or duty, expressed or implied, arising out of *any undertaking* in connection with *any transaction* . . . ." (emphasis added).

7 U.S.C. § 499b(4).

The key word is "any." Congress' intention to regulate the perishable commodities market is shown by its failure to specify individual transactions which it considered to be unlawful. This term is all encompassing to include all unlawful transactions without exception. The implied duty clause broadens the scope of the Act to afford the Secretary the authority to exercise the expertise and discretion necessary to regulate specialized problems that may arise in the perishable agriculture commodities industry on a case-by-case basis. "Congress used the terms '... express and implied duties...' rather than specify all practices that would be a violation of the PACA, for that is an impossible task." JO's Dec. at 21. The PACA's regulations state:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. § 46.26 (1989).

The Secretary found that commercial bribery[4] was a violation of the PACA's implied duty clause. The Secretary has consistently enforced the PACA to ensure that members of the industry deal fairly with one another at arm's length. *See United Fruit and Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd sub nom. United Fruit and Vegetable Co. v. Dir. of Fruit and Vegetable Div.*, 668 F.2d 983 (8th Cir. 1982) (enforcing prompt payment requirements to assure financial responsibility in industry); *The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1137-38 (1981) (prohibiting changes after a contract is made in order to ensure that parties deal on equal terms). Thus, Goodman had an implied duty to deal fairly with other members in the industry.

This Court must be deferential to the agency's construction of the statute that Congress entrusted to its administration. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In reviewing an agency's construction of a statute,

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[4] Commercial bribery is "the offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman, The Law of Unfair Competition Trademarks and Monopolies § 49 (3rd ed. 1968) (ALJ Dec. at 20).

a court must give effect first to the unambiguously expressed intent of Congress. If Congress has not addressed the precise issue,

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.... A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Id.* at 843-44.

Although the statute specifically prohibits Goodman's behavior pursuant to the fraudulent statement provision, discussed below, and also pursuant to the implied duty provision, the legislative history indicates that PACA was enacted to regulate the entire perishable agricultural commodities industry, not solely the relationship between the growers and the shippers. This is indicated by PACA's strict accounting and payment requirements, which were intended to assure financial integrity among all members of the produce industry. Courts enforce these requirements strictly to further the Act's goal of ensuring "that only financially responsible persons should he engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dep't of Agric,* 524 F.2d 1255, 1257 (5th Cir. 1975); *Citrus Co. v. Goldstein,* 214 F.Supp. 823, 827 (E.D.Pa. 1963) ("Clearly the Act was intended to regulate all persons who operate in the business of dealing with perishable agricultural commodities in interstate commerce.").

The plain language of the statute and legislative history clearly support the administrator's construction of the statute. Kickback payments made to gain an unfair advantage over one's competitors disadvantages the producers, the consignors and the

consumer. Thus, Goodman had an implied duty to deal fairly with its competitors and by paying kickbacks, Goodman's competitors were held at an unfair advantage.

II

Goodman's constitutional arguments are also without merit. Goodman argues that the implied duty clause provides no specifications of what types of implied duties are owed under the Act. It maintains that where an agency attempts to apply statutes or regulations to conduct not intended to be encompassed by those provisions, the agency action must be invalidated for a lack of fair warning. *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n,* 528 F.2d 645, 649 (5th Cir. 1976). Courts are primarily concerned that vague statutes allow those enforcing them to exercise unfettered discretion, *id.* and *Kolender v. Lawson,* 461 U.S. 352, 357 (1983), and Goodman argues the PACA's vagueness would permit courts to consider all conduct by licensees to be a violation of a statute.

The United States Supreme Court held that a statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties... [and] a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

*Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1925); *Sorenson v. Nat'l Transp. Safety Board,* 684 F.2d 683, 686 (10th Cir. 1982) (licensees are "entitled to be informed with reasonable certainty and explicitness of the standards by which [their] license[s] may be revoked"). The Supreme Court applies an objective test and interprets a statute designed to regulate business activities according to what "a business person of ordinary intelligence" would understand to be innocent or

proscribed conduct. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982).

The Secretary's construction of the implied duty clause to proscribe commercial bribery will not entrap licensees engaging in innocent conduct; it is aimed only at preventing unfair conduct designed to undermine the industry's stability. It does not proscribe legal activity.

Goodman also argues that the JO confused Goodman's void-for-vagueness due process argument with traditional procedural due process arguments concerning notice and that the Department's Order must be set aside since the JO failed to consider one of the two constitutional due process arguments raised. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1930) (decision is arbitrary and capricious if the agency has... failed to consider an important aspect of the problem). Goodman's constitutional argument was two-fold: (1) the statute is to provide explicit standards so that law enforcement officials and administrative agencies are not free to institute arbitrary actions, the void-for-vagueness argument discussed above; and (2) traditional due process requires that those *already charged* with violations of some provision be adequately apprised of the actual charges against them so that they may have an opportunity to defend themselves. Goodman contends that the JO failed to address the second argument, specifically, that its due process right had been infringed because no statute, regulation or Department policy statement had provided adequate guidance, *prior* to the institution of the proceeding, as to what behavior could be considered a violation of the implied duty clause. In other words, it argues that the Department did not provide notice to it of its views on payments to retailers' purchasing agents.

Goodman relies upon *Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987) for the proposition that new law may not be made by adjudication where agency attempted to enforce a prohibition

on "wash sales" without having statutory definition of the term, even though several letters distributed to floor brokers stated that the conduct engaged in by the respondent was a prohibited "wash sale".

*Stoller* is inapposite. *Stoller* acknowledged that an agency is free to interpret its governing statute case-by-case through adjudicatory proceedings rather than rulemaking, *id.* at 265, and held that an agency cannot revise an established standard in an adjudicatory proceeding to the detriment of a litigant who relied on the agency's prior policy or interpretation. *Id.* at 265-66. Here, the established standard was to protect the integrity and efficiency of the perishable commodities market and all unlawful transactions are a violation of that standard. There was no revision of that standard at the hearing. Unfair practices, such as commercial bribery, are clearly a violation of that standard.

This Court's scope of review of "an administrative order wherein a new principle is announced and applied is the same as that which pertains to ordinary administrative action. . . . Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress." *Id.* at 207. The Court's review of the sanctions imposed by the Secretary is more limited than its review of the findings of violations.

> [W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter of administrative competence." *American Power Co. v. SEC,* 329 U.S. 90, 112 (1946).

*Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185 (1973).

The statute provides adequate notice to Goodman that payments made to induce its customers to purchase produce, an otherwise illegal activity, would be prohibited.

III

Goodman disputes the JO's finding that it violated section 2(4) of the PACA because its invoices were "false statements" as prohibited by the PACA. It argues that the invoices were submitted solely to reflect the amount of money owed to Goodman for deliveries of produce to Magruder and Fresh Value. Goodman also argues that the Court must find that in making the 25-cent payments in these transactions, Goodman "fraudulently obtained" money from the supermarkets to return to their agents, rather than merely negotiating a price for the produce and making a payment from its own profits.

The invoices omitted the 75-cent mark-ups and the 25-cent kickback, and therefore failed to accurately represent the amount Goodman received for the sale of the produce. The $107,000 worth of commercial transactions made pursuant to wholesale sales to Magruder and Fresh value were also concealed. Thus, the invoices were made "for a fraudulent purpose, [a] false or misleading statement in connection with . . . transaction[s] involving [a] perishable agricultural commodity . . . sold in [interstate] commerce. . ." 7 U.S.C. § 499b(4).

Whether the money was paid from Goodman's profits or its customers' pockets is irrelevant. Goodman's actions of inducing a customer to purchase produce from it is commercial bribery irrespective of where the inducement comes from.

IV

Goodman maintains that its conduct was not "willful" as statutorily required and that even if its violations were willful, the Secretary's decision to revoke its license was arbitrary and capricious since he could not have found such conduct to be "flagrant or repeated."

Section 499h(a) provides that:

> [w]henever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, ... the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender...

In *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990), the Court held that "'willfulness', for the purposes of section 558(c) means an 'intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof'." Goodman argues that it had no awareness that such conduct constituted a violation of the Act because of the lack of regulations, policy statements, or a pattern of prior prosecutions.

Goodman's argument is meritless. As discussed above, Goodman should have known that illegal inducements to purchase its produce violates its implied duty to deal fairly and at arms-length.

The record demonstrates that Goodman systematically paid 25 cents per package kickbacks and that these kickbacks were omitted from the invoices in an intentional attempt to deceive Magruder, Fresh Value and M. Offutt Co. These acts fall within the "intentional misdeed" provision of section 499(b). Goodman surreptitiously paid kickbacks to its produce buyers for a period of approximately a year and a half. Such acts are clearly flagrant and repeated on a weekly basis.

This case is

*AFFIRMED.*

PACA Docket No. 89-253

# UNITED STATES DEPARTMENT OF AGRICULTURE
# BEFORE THE SECRETARY OF AGRICULTURE

DECIDED: 9/26/90

In re

SID Goodman & Company, Inc.,

*Respondent*

## Decision and Order

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Paul Kane (ALJ) filed an Initial Decision and Order on February 28, 1990, revoking respondent's license for reporting, accounting and payment violations arising out of respondent's surreptitious payments to the buying agents of respondent's customers.

On May 2, 1990, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On June 1, 1990, the case was referred to the Judicial Officer for decision.

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* *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the case has been fully briefed and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, the Initial Decision and Order is adopted as the final Decision and Order in this case (with omissions shown by dots and changes by brackets), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

## ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, September 6, 1966, 80 Stat. 384, as amended, Pub. L. 95-251, March 27, 1978, 92 Stat. 183,[1] and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1989).

The Director of the Fruit and Vegetable Division of the Department's Agricultural Marketing Service, by complaint filed April 18, 1989, alleges that Sid Goodman & Company, Inc., hereinafter the respondent, a licensee of the Department, has willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act, June 10, 1930, ch. 436, 46 Stat. 531, as amended, Apr. 13, 1934, ch. 120, 48 Stat. 584; Aug. 20, 1937, ch. 719, 50 Stat. 725; June 29, 1940, ch. 456, 54 Stat. 696; Oct. 1, 1962, Pub. L. 87-725, 76 Stat. 673; Nov. 4, 1969, Pub. L. 91-107, 83 Stat. 182; Nov. 1, 1978, Pub. L. 95-562, 92 Stat. 2381; Dec. 22, 1981, Pub. L. 97-98, Title XI, 95 Stat. 1269; Oct. 15, 1982, Pub. L. 97-352, 96 Stat. 1667; May 7, 1984, Pub. L. 98-273, 98 Stat. 166, hereinafter the Act, or PACA specifically

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[1] 5 U.S.C.A. §§ 554, 557 (West 1977 & Supp. 1989) [hereinafter cited as unofficially codified].

§ 2(4) thereof.[2] The complaint features the monies respondent gave, surreptitiously, to employees, of two different customers, without notifying those customers, to induce the purchase of perishable agricultural commodities. Specifically, the complaint alleges that respondent gave more than $66,000 to William Crandall, an employee, of Magruder, Inc., and more than $41,000 to Henry Hernandes, an employee of Fresh Value, Inc., in order to induce Messrs. Crandall and Hernandes to purchase perishable agricultural commodities from respondent. The complaint alleges that Messrs. Crandall and Hernandes were authorized to make purchases of produce on behalf of their respective employers. The respondent was advised upon the issuance of the complaint that this conduct warrants the revocation of its license to engage in the sale of produce.

Respondent filed a motion for a more definite statement on May 10, 1989, asking that complainant be required to specify which of the four unnumbered clauses contained in section 2(4) of the PACA that the complaint alleges that respondent had violated. Respondent also filed an answer denying the allegations of the violations.

A prehearing order was issued by the administrative law judge on August 2, 1989, requesting that complaint counsel disclose the legal theories supporting the prosecution. Counsel responded on August 2, 1989, that "Respondent violated section 2(4) of the Perishable Agricultural Commodities Act, 1930. . . by giving money or something of value to employees of two of its customers to induce those employees to make purchases from it on behalf of their employers without informing the employers of this arrangement."[3]

On August 4, 1989, complaint counsel was again requested to clarify the legal theories supporting the case. Counsel

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[2] 7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1989) [hereinafter cited as unofficially codified].

[3] Complainant's response filed August 2, 1989.

responded on August 9, 1989, revealing that respondent's actions would be proved to have violated the first three unnumbered clauses of 7 U.S.C.A. § 499b(4).

An oral hearing was held on September 27-28, 1989, in Washington D.C., before the undersigned. Subsequently, proposed findings and briefs were filed by counsel. To the extent indicated, they are adopted herein. All other proposed findings, conclusions, and arguments are rejected as being irrelevant, or lacking legal or evidentiary bases. In this opinion, "Tr." refers to the transcript of the public hearing. "CX" refers to the numbered exhibits offered by complaint counsel. "RX" refers to the numbered exhibits offered by respondent's counsel.

The United States Department of Agriculture, hereinafter the Department, is represented by Edward M. Silverstein, Esq., Washington, D.C. Sid Goodman & Company, Inc., is represented by Edward M. Ruckert, Esq., Neil J. Welch, Jr., Esq., and Jennifer K. Wirick, Esq., Washington, D.C.

Upon consideration of all matters of record, the following Findings of Fact are made and Conclusions of Law reached. As a result, violations are found as alleged, and there is entered an order as requested by complaint counsel.

**Findings of Fact**

1. Respondent, Sid Goodman & Company, Inc., is a corporation engaged in the fresh produce wholesale business. Its address is Maryland Wholesale Produce Market, Bldg. A, Units 2-12, Jessup, Maryland 20194. (Complaint; Answer)

2. Respondent was issued a license numbered 681265 on January 29, 1990, pursuant to section 4 of the PACA. The license has been renewed annually and was next subject to renewal on or before January 29, 1990. (Complaint; Answer; Tr. 31-2; CX 1)

3. Respondent operates as a produce dealer on the Maryland Wholesale Produce Market in Jessup, Maryland. Respondent purchases produce from out-of-state shippers and sells the produce so purchased in the Baltimore and Washington areas. Respondent also accepts produce on consignment from out-of-state shippers and sells the produce in the Baltimore and Washington areas, on behalf of consignors. Two of respondent's customers are Magruder, Inc., hereinafter Magruder, and Fresh Value, Inc., hereinafter Fresh Value. (Tr. 13-14, 99-100, 101-02, 118; CX 2, 3, 6, 10, 13, 16, 17)

4. The Fruit and Vegetable Division, Agricultural Marketing Service, of the Department, received a complaint from M. Offutt Co., Inc., hereinafter referred to as M. Offutt Co., 1500 Parker Street, Dallas, Texas 75215, in which M. Offutt Co. sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. M. Offutt Co. requested that the Department conduct an investigation to determine whether the accounts of sale which respondent presented to it were accurate. (Tr. 13-4,32-3; CX 2)

5. A Department employee, Mr. James Bright, was assigned to investigate M. Offutt Co.'s complaint. Mr. Bright conducted an investigation at respondent's place of business on August 8-9, August 16-19, August 29, and October 4, 1988. (Tr. 13-4, 18-29)

6. During the course of the investigation, Mr. Bright discovered that respondent was making payments to employees of two of its customers. Mr. Bright learned that respondent was paying 25 cents per package for produce purchased on behalf of Magruder, by William Crandall, the produce buyer for Magruder, and on behalf of Fresh Value, by Henry Hernandes, the produce buyer for Fresh Value. Respondent admits, by its answer, that Messrs. Crandall and Hernandes were delegated authority to make produce purchases on behalf of their respective employers. Mr. Bright notified his supervisors, who in-

structed him to return to the respondent's place of business and obtain clarification and additional information. Mr. Bright continued his investigation on October 17 through November 18, 1988. Mr. Bright was accompanied by Ms. Kathy Feiffer, also an employee of the Department. (Tr. 22-31)

7. William Crandall was employed by Magruder from 1977 through 1988. Magruder operates 14 retail supermarkets located in Maryland, Virginia and Washington, D.C. In or about 1981, Mr. Crandall was promoted to Assistant Vice President and Produce Buyer for Magruder. Mr. Crandall at all times relevant herein was in charge of the produce operations for Magruder. (Tr. 112-14, 131; RX B, pp. 14-15)

8. From January 1987 through December 1987, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27,36-37) made respondent's checks based on a package calculation (RX B, p. 27), totalling more than $38,000, and issued and gave these checks to Mr. Crandall for the produce he purchased from respondent on behalf of Magruder, in order to induce Mr. Crandall to purchase perishable agricultural commodities from respondent. These payments amounted to more than $27,000 between January 1988 and September 1988. (Tr. 22-24,33-47, 113-14; CX 3, 4, 5, 6, 7, 8, 9, 10) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

9. Mr. Crandall did not inform his superiors at Magruder that he was receiving a payment per package for the produce he purchased from respondent on behalf of Magruder. (Tr. 116-17, 119, 158-60; RX B, pp. 39-40, 90, 94-96, 99-101)

10. Magruder has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. The policy provides [emphasis added]:

*It will not be permissible for any Store Employee or Manager to accept or Solicit Gifts, Premiums, Free Goods or Monetary Items* from the *trade* at *any time.* This will include any and everything from a cup of coffee, T-Shirts, Ball Hats and gifts of greater value. As certain vendors will occasionally deliver gifts or premiums to a residence, it will be understood that such gifts and premiums are property of Magruder and must be turned in to the office immediately upon their being received.

Obviously the trade does offer up many incentives and premiums from time to time in an effort to increase their volume. In all instances you will be expected to communicate such promotions back to the office and directions will be given on how to handle such deals.

Violations of this policy will result in serious disciplinary action up to and including termination of employment. (RX 1; Tr. 115, 152-55, 231-32)

11. The capital stockholders, directors and officers of Magruder, except Mr. Crandall, were not aware that Mr. Crandall was receiving a per package payment from respondent for purchasing perishable agricultural commodities from it on behalf of Magruder. (Tr. 115-17, 119, 159-60; RX, pp. 94-96,99-101)

12. Mr. Crandall's employment with Magruder terminated in November 1988. (Tr. 114; RX B, pp. 38-39)

13. Henry Hernandes was employed by Fresh Value from 1983 through 1988. Fresh Value operates four retail supermarkets in Virginia and Maryland. Mr. Hernandes was in charge of the produce operations for the company. (Tr. 88-90)

14. From April 1987 through September 1988, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27,

36-37) made respondent's checks, based on a package calculation, totalling more than $41,000, and issued and gave these checks to the spouse of Mr. Hernandes for the produce Mr. Hernandes purchased from respondent on behalf of Fresh Value, in order to induce Mr. Hernandes to purchase perishable agricultural commodities from respondent. (Tr. 22-24, 33-35, 47-53, 89-90, 167-74; CX 11, 12, 13, 14, 15, 16, 17) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

15. Mr. Hernandes did not inform his superiors at Fresh Value, that he was receiving a payment per package for the produce he purchased from respondent on behalf of Fresh Value. (Tr. 91-92, 174-75)

16. Fresh Value has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. (Tr. 90-91)

17. The capital stockholders, directors and officers of Fresh Value, except Mr. Hernandes, were not aware that Mr. Hernandes was receiving a payment per package from respondent for purchasing perishable agricultural commodities from it on behalf of Fresh Value. (Tr. 91-92, 110)

18. Mr. Hernandes' employment with Fresh Value terminated in or around November 1988. (Tr. 93)

19. Respondent did not inform either the superiors of Mr. Crandall at Magruder nor the superiors of Mr. Hernandes at Fresh Value that it was giving their respective employees, Messrs. Crandall and Hernandes, a payment per package for produce that each employee purchased from respondent on their employers' behalf. (Tr. 92-94, 119)

20. Respondent's invoices to Magruder and Fresh Value, and respondent's accountings to M. Offutt Co. did not reflect respondent's payments to Messrs. Crandall and Hernandes. (Tr. 22-24, 33-53, 167-174; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17)

## Statutes and Regulations

Respondent is alleged to have violated the PACA in the following specific section:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title.[4]

The Secretary's definitions of relevant sections of PACA are expressed in the following regulations:

> (y) "Truly and correctly to account" means, in connection with:
>
> (1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or

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[4] 7 U.S.C.A. § 499b(4).

other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by § 46.29.

* * *

(z) "Account promptly," except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

* * *

(2) In connection with consignment . . . transactions, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first: . . . .

* * *

(aa) "Full payment promptly" is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act means:

(1) Payment of net proceeds for produce received on consignment . . . within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first. . . .[5]

The Secretary's regulations further describe the general duties of licensees in the following language:

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. There-

[5] 7 C.F.R. § 46.2 (1989).

> fore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.[6]

The duties of licensees who accept produce on consignment are outlined as follows:

> (a) *General.* All licensees who accept produce for sale on consignment . . . are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner . . . . Complete and detailed records shall be prepared and maintained by all commission merchants . . . covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of § 46.18 through § 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the Act to fail to render true and correct accounting in connection with consignments . . . Charges which cannot be supported by proper evidence in the records of the commission merchant . . . shall not be deducted. The commission merchant . . . may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence of failure to perform any specification or

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[6] 7 C.F.R. § 46.26 (1989).

duty, express or implied, arising out of any transaction subject to the Act.[7]

Statutory authority to revoke a respondent's license is based on the following:

> (a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or . . ., the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender . . . .[8]

The imposition of sanctions by Federal agencies is restricted by the Administrative Procedure Act. It provides:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
>
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.
>
> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety re-

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[7] 7 C.F.R. § 46.29(a) (1989).

[8] 7 U.S.C.A. § 499h(a).

quires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.[9]

**Discussion**

It is not disputed nor at issue that respondent is a commission merchant, dealer or broker, nor that the commodities involved in these transactions were produce, nor that sales and consignments were the means by which these items entered interstate commerce.

At issue is whether respondent violated 7 U.S.C.A. § 2(4) of the PACA in its reporting requirements: (1) by making false statements on the invoices it submitted to its customers, Magruder and Fresh Value, and (2) by making false statements on accounting to its consignors and by failing to account truly and correctly, and make full payment promptly to those consignors. Also at issue is whether respondent failed to perform an implied duty it owed to its customers, Magruder and Fresh Value. The failure of respondent to not corrupt the employees of Magruder and Fresh Value, and to inform Magruder and

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[9] 5 U.S.C.A. § 558.

Fresh Value of the per package payment to these employees is identified as the failure of an implied duty. The failure of this implied duty presents a novel question, as this is the first case, examining secret payments by a produce supplier to its customers' employees brought under this statute.

The remaining issue resolves the application of 5 U.S.C.A. § 558 to the sanction sought by this action.

> The PACA makes it unlawful in interstate or foreign commerce:
>
> [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity . . . or to fail or refuse truly and correctly to account and to make full payment promptly. . . .[10]

This section prohibits submitting false invoices, or false statements therein and making a false and fraudulent accounting. *Michael Scalise, Sr.*, 12 Agric. Dec. 1105 (1953). The evidence indicates that respondent charged its customers, Magruder and Fresh Value, a maximum surcharge of 25 cents per package for produce it sold to them and then recaptured and paid these aggregate sums to Messrs. Crandall and Hernandes. (Tr. 22-24,33-53, 167-74; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17; RX B, pp. 27, 29) The invoices submitted to Magruder and Fresh Value, by respondent, did not indicate that an additional charge was being made on each package of produce purchased from respondent for payment to their employees. Neither Magruder nor Fresh Value was aware that respondent was giving their employees a per package payment. (Tr. 91-94; 119)

Most frequently the sales prices on the invoices to Magruder exceeded by 75 cents, per package, the sales prices listed on the accounting to the consignor, M. Offutt Co. on sales

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[10] 7 U.S.C.A. § 499b(4).

to Magruder; 50 cents was paid for freight costs and 25 cents was paid to Mr. Crandall. (Tr. 22-24; CX 3) Respondent did not consider the 25 cents per package payment as part of the sales price it was charging Magruder as it did not include it on the accounting it sent to its consignor. (Tr. 22-24, 33-36; CX 3)

These actions violated the PACA. The invoices submitted to Magruder and Fresh Value were false and misleading and were made for the purposes of fraudulently obtaining a 25 cents per package payment, which was then passed under-the-table to Messrs. Crandall and Hernandes.

Respondent has also violated PACA by making false statements on its accounting and by failing to account truly and correctly, and make full payment promptly to a consignor. *Harry Klein Produce Corp.*, 46. Dec. 134, *aff'd sub nom. Henry Klein Produce Corp. v. U.S.D.A.*, 831 F.2d 403 (2d Cir. 1987). A commission merchant, dealer or broker, in connection with a consignment transaction, is required to provide a true and correct statement showing the date of receipt, date of final sale, quantities sold at each price, or other disposition of the produce.[11] "Full payment promptly" requires payment of the net proceeds for produce received on consignment within 10 days after the day on which the last sale was made.[12]

The consignor, M. Offutt Co., located in Dallas, Texas, sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. An investigation by the Fruit and Vegatable Division, Agricultural Marketing Service, revealed several discrepancies between that which respondent reported to M. Offutt Co. and the respondent's records. The total number of sales of M. Offutt Co. property by respondent to its customers did not equal the total number of packages received by respondent from M. Offut. Co. (Tr. 18) This was determined by comparing the number of

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[11] 7 C.F.R. § 46.2(y)(1).

[12] 7 C.F.R. § 46.2(aa).

packages received by respondent from M. Offutt Co., which was recorded in respondent's receiving book, to the sales invoices created by the respondent when it sold the produce to Magruder. (Tr. 20-21) There were instances where particular lots were received but not recorded as sold. There were also instances of produce sold that was not recorded as received. (Tr. 21-22)

From these records, it became apparent that sales to Magruder suffered a 75 cents discrepancy between the invoice price and the price reported by respondent to M. Offutt Co. The accounting submitted to M. Offutt Co. did not explain the discrepancy between the sales price charged to Magruder and the sales price reported back to it. The respondent was receiving 25 cents more from Magruder than it was accounting and paying to M. Offutt Co.; 50 cents per package was recognized and paid for freight costs. (Tr. 22-24, 33-36; CX 3) [Although respondent later paid M. Offutt Co. the amount which the Department's investigators found due, after being advised of the investigators' findings (see Tr. 29), that is not a sufficiently mitigating circumstance to affect the sanction here.]

Another violation of the PACA exists upon respondent's failure to perform an implied duty it owed to its customers, Magruder and Fresh Value. This duty was to not corrupt the employees of these customers, and to inform Magruder and Fresh Value of the per package payment to these individuals.

The PACA makes it unlawful for a commission merchant, dealer, or broker "... to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction ...."[13] The Department's regulations offered as an elaboration of the PACA, specify that a licensee has the responsibility "... to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act."[14]

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[13] 7 U.S.C.A. § 499b(4).

[14] 7 C.F.R. § 46.26.

Thus, the PACA and regulations, both recognize the existence of duties owed by middlemen to their customers and require these licensed cogs to acknowledge the duties they assume with the grant of a license, by both affirmative actions, such as providing accurate tallies, and by displays of restraint, such as avoiding that which is occasionally called "payola."

The plain language of the statute, the point at which interpretation commences, *Mallard v. United States District Court*, 490 U.S. ___, 109 S.Ct. 1814, 1818, 104 L. Ed.2d 318 (1989), makes it certain that those whose applications have brought them PACA licenses, hold those licenses pursuant to duties, and even in the disjunctive, those duties are expressed or implied. Here, the focus is on implied duties, and whether such are defined; or, indeed whether such duties need be defined.

The PACA was enacted to protect growers and shippers of fresh fruits and vegetables from a variety of unfair practices engaged in by commission merchants, dealers and brokers. Congress intended to lay down certain rules as to what would be considered fair conduct. 71 Cong. Rec. S2162, S2163 (daily ed. May 29, 1929). The primary purpose of the PACA ". . . was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities. *See*, H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)." *Chidsey v. Guerin*, 443 F.2d 584, 587 (6th Cir. 1971); *see also O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 857-58 (9th Cir. 1976); *Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 142, *aff'd sub nom. Harry Klein Produce Corp. v. U.S.D.A.*, 831 F.2d 403 (2d Cir. 1987). The purposes of the PACA are effectuated through a system of licensing with penalties for violations, *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830, 95 S. Ct. 53, 42 L.Ed.2d 55 (1974).

The legislative history also reflects that in enacting the PACA, Congress sought to encourage fair trading practices in the produce industry:

> The Perishable Agricultural Commodities Act was enacted in 1930 to encourage fair trading practices in the marketing of perishable commodities by supressing unfair and fraudulent business practices in marketing fresh and frozen fruits and vegetables . . . and providing for collecting damages from any buyer or seller who fails to live up to his contractual obligations.

H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1984); *see also* S. Rep. No. 1122, 81st Cong., 1st Sess. 2 (1949); H.R. Rep. No. 1041, 71st Cong., 2d Sess. 2 (1930). The legislative history of PACA does not cast either approbation or censure upon the type of activity displayed by respondent. However, there is an indication that Congress had, in 1942, a heightened concern about the contractual dealings in the produce industry. The clause ". . . or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction . . ." was added at the same time Congress added the words ". . . and make full payment, . . ." as the result of a Federal Court decision. H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942). Congress was so concerned about the contractual relationships between growers on one hand, and commission merchants, dealers and brokers that on the other they made the failure to promptly make payments a violation of the PACA. From this it can be inferred that Congress wanted to assure that general commercial duties to deal fairly would be required of PACA licensees.

This is consistent with the history of the PACA which supports a conclusion that members of the produce industry have an obligation to deal fairly with one another — at arm's length; *United Fruit and Vegetable Co.*, 40 Agric. Dec. 396 (1981),

*aff'd sub nom. United Fruit and Vegetable Co. v. Director of the Fruit & Vegetable Div.*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007, 102 S. Ct. 2299, 73 L.Ed.2d 1302 (1982); *The Connecticut Celery Co.*, 40 Agric. Dec. 1131 (1981) (to assure equality of bargaining power, the regulations prohibit renegotiation of a contract to extend payment); *Bruce Church, Inc. v. Leonard O'Day Co.*, 31 Agric Dec. 676 (1972); *Hastings Potato Growers Assoc. v. M. Singer's Sons Corp.*, 20 Agric. Dec. 734 (1961) (renegotiated contract is voidable when a party to it withholds a material fact he was bound to disclose).

Respondent's per package payment to its customers' employees to induce them to purchase produce is similar to the practice of commercial bribery, which is defined as:

> ... [T]he "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

*National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728 (1977), *aff'd sub nom. National Beef Packing Co. v. Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979).

The practice of commercial bribery has been found to be a violation of the Packers and Stockyards Act,[15] *National Beef Packing Co., id.*, and the Robinson-Patman Amendments to the Clayton Act,[16] *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 16 (6th Cir. 1943). It has also been held to be an unfair trade practice under section 5 of the Federal Trade Commission

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[15] 7 U.S.C.A. § 192 (1988).

[16] 15 U.S.C. § 13(c) (1988).

Act,[17] *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939).

Section 5 of the Federal Trade Commission Act prohibits ". . . unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."[18] The term "unfair" is not defined in the Act. Congress intended to a make a broad delegation of power to regulate and control unfair methods of competition. Congress further intended to provide the Federal Trade Commission with broad discretion in interpreting section 5:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.[19]

Limitless human inventiveness prevents the Congress from the adoption of legislation specifying each and every type of commercial behavior which might be avoided. Hence, it created a general frame-work and assigned the administrative agencies with specific expertise the tasks of identifying and prohibiting unfair practices. Congress used the terms ". . . express and implied duties . . ." rather than specify all practices that would be a violation of the PACA, for that is an impossible task.

An examination of cases dealing with commercial bribery explains why it has been held to be an unfair trade practice. The matter has been addressed at the Department of Agriculture-in *National Beef Packing Co., id.* at 1728-29:

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[17] 15 U.S.C.A. § 45 (1988).

[18] *Id.*

[19] *American Cyanamid Co. v. FTC*, 363 F.2d 757, 769 (6th Cir. 1966) (citation omitted).

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> '... interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy...., 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

Additional rationale castigating commercial bribery is found in *Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *aff'd sub nom. Holiday Food Services, Inc. v. Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted

> judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Commercial bribery has been determined to be an unfair trade practice, and Congress' goal in enacting the PACA was to prohibit unfair trading practices in the produce industry. Congress specifically noted that there were to be implied duties. The language "implied duty" may be interpreted to encompass the allegations present here. Respondent owed an implied duty to Magruder and Fresh Value to refrain from corrupting their employees. A PACA licensee is obligated to refrain from offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of the employer. (Tr. 201-02) On the other hand, if the employee seeks such a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer. (Tr. 202, 207-11)

The payments by respondent to Messrs. Crandall and Hernandes, without permission of Magruder and Fresh Value, is a violation of section 2(4) of the PACA. The payments were made to induce Messrs. Crandall and Hernandes to purchase produce from respondent. Such payments can have the effect of destroying competition in the produce industry since those purchasers receiving kickbacks are most likely to purchase produce from the sellers paying them. Payments such as these can also affect the buyer's decision so that the employee may not be purchasing the best quality produce at the best price for the employer. The practice of payments by respondent was an evil and corrupt practice likely to interrupt the flow of competition and fair dealing in the produce industry.

Counsel to respondent argues that the complaint counsel failed to show that the alleged payments resulted in any inducement. Mr. Crandall received $38,021.95 (CX 4) in checks from respondent during 1987. These checks, 50 in number, were written each week during the calendar year except during the month of September 1987, and recorded covert activity for most business days of the year. All checks were based on fluctuating quantities at 25 cents, except during October when sums were additionally calculated on quantities at 10 cents. These checks were signed by three different individuals named Goodman and were endorsed by William, and often, Dorothy Crandall. During 1987, the smallest check drawn on respondent and made payable to William Crandall was $236; the largest was $1,549. Each check, which passed through Mr. Crandall's financial institutions, contained a memo section which related the amount of the check to invoices and shipment records of produce sold daily to Magruder by respondent. (CX 4, 5, 6) The frequency of the dates on which respondent incurred a liability to Mr. Crandall is sufficient to establish that Mr. Crandall had established a proprietary interest in the commercial relationships which existed between respondent and Magruder. Respondent paid Mr. Crandall more than $100 for each day Magruder had its doors open for business. In 1987, beginning in April, and continuing through December, checks were also written each week by three different individuals named Goodman to Jennifer Hernandes, the spouse of Fresh Value's produce buyer, Henry Hernandes. These checks were for amounts exceeding $16,000. In the latter part of 1987, these monies were returned to respondent in payment for purchases of produce which the Hernandes' began selling to a trade other than that serviced by Fresh Value. Hence, respondent's payoffs to Henry Hernandes, which were an expense to Fresh Value as a cost of goods sold, were used in a speculative venture potentially in competition with Mr. Hernandes' employer, Fresh Value. (CX 11-13; Tr. 47-50, 168-171)

Respondent's counsel contends that officials of Magruder and Fresh Value authorized secret payments to their produce buyers. Stanford Steppa, Executive Vice President and co-owner of Magruder, and Leopoldo Alonzo, President and owner of Fresh Value, denied knowledge of these payments. Counsel contends the testimony of these individuals is not credible, relying instead on the deposition of William Crandall to argue that Mr. Steppa knew of the payments from respondent to Mr. Crandall. (RX B) Counsel would thrust credibility upon Mr. Crandall's deposition because statements were made against his interest.

Messrs. Steppa and Alonzo appeared at the hearing. I saw and heard them testify and I determine that their testimony was entirely credible. I did not have a chance to see or hear Mr. Crandall, even though a subpoena was issued to compel his attendance. (RX A) A deposition by Mr. Crandall, given in a private civil case, was offered by respondent's counsel and received into evidence. He was not cross-examined by complaint counsel. However, a thorough examination of the deposition results in the conclusion that in fact Mr. Crandall did not inform Mr. Steppa of the per package payment he had received from respondent. (RX B, pp. 39-40, 90, 94-96, 99-101) This evidence, combined with the testimony of Mr. Steppa, indicates that Mr. Steppa did not have knowledge that respondent's employees were paying Mr. Crandall for each package of produce purchased from it. (Tr. 115-17, 119, 158-60) The evidence also substantiates that Mr. Alonzo of Fresh Value did not know that respondent was making the payments to Mr. Hernandes. (Tr. 91-92,110,174-75) In fact, Jennifer Hernandes testified that she and her husband, Henry, went to great lengths to prevent Mr. Alonzo from learning of the payments they were receiving from respondent. (Tr. 171,174-75)

It is relevant that officers and employees of respondent did not offer testimony in defense of their actions. (Tr. 195) Mr.

David Goodman, who issued checks on behalf of respondent to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 37, 40, 43, 106, 145), appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mrs. Donna Goodman, who also issued checks on behalf of respondent to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 49, 61, 67), likewise appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mr. Leon Goodman, who also issued checks to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 46, 55, 64, 91, 100, 115), was not subpoenaed. A negative inference may be drawn from this failure of evidence; *Ludwig Casca*, 34 Agric. Dec. 1917, 1929 (1975). Respondent's witnesses who are employees of Sid Goodman & Company, Inc., all refused to testify and invoked the protection of the Fifth Amendment of the United States Constitution. In civil cases, a negative inference may be drawn from the refusal of a witness to testify. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976). These witnesses were the only witnesses who could have testified that they had informed Magruder and Fresh Value of payments, but they chose not to offer their testimony.

Respondent's counsel argues that Messrs. Steppa and Alonzo should have known about the payments from respondent to their employees, because they themselves have accepted payoffs. (Tr. 91, 103-05, 114-17, 151, 153-54, 224-27, 240, 250) Respondent's counsel states that it is a common practice in the produce industry to influence a buyer's decision with payoffs. However, the examples which respondent cites as so-called payoffs are supplier promotions and incentive awards occasionally given to customers by produce suppliers. Two of the examples consisted of cash payments. (Tr. 103-04, 117) In each example, Messrs. Steppa and Alonzo were aware of the payments and allowed them. (Tr. 90-91, 115, 152-55, 231-32; RX 1)

Respondent's counsel argues that as a matter of law, Magruder and Fresh Value are charged with the knowledge of the payments from respondent to Messrs. Crandall and Hernandes. Respondent cites to 7 U.S.C.A. § 499p and 7 C.F.R. § 46.41 which refer to acts committed by agents of licensees, i.e., commission merchants, dealers and brokers. Respondent argues that these also obtain application to customers and employees of the licensees. However, the licensee in this case is respondent, not its customers. Therefore, these sections are inapplicable.

For support of its argument that knowledge of the secret payments ought to be imputed to Magruder and Fresh Value, respondent cites to cases discussing general agency law that a principal is liable for the acts of its agent. These cases refer to a situation where the agent is acting with apparent authority and is able to bind the principal. However, four of the five PACA reparation decisions cited by respondent, held that an agent acting within the scope of this apparent authority bound his principal where a party relied in good faith and would have suffered a loss had the agency relationship not been upheld. *Tom Moore Co. v. Amigomex, Inc.*, 42 Agric. Dec. 1668 (1983); *Western Cold Storage Co. v. Schons*, 38 Agric. Dec. 903 (1979); *George Arakelian Farms, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 1395 (1972); *Nach-De Camp Co. v. S. Albertson Co.*, 13 Agric. Dec. 283 (1954). The fifth case does not present facts which are comparable to the facts here. *See Southland Produce Co. v. Delta Packing Co.*, 41 Agric. Dec. 981 (1982).

In this case, the Goodmans drafted checks to Mr. Crandall and Mrs. Hernandes personally, not to Magruder or Fresh Value. Indeed the checks to Mrs. Hernandes were written so as to assure that her husband's supervisors at Fresh Value would not have knowledge of this scheme. (Tr. 172) There is no evidence that either Magruder or Fresh Value authorized their employees to act as their agents in accepting the per package payment from respondent, or even that Messrs. Crandall and Hernandes pur-

ported to represent their employers in entering into the illicit agreements with respondent.

Respondent's counsel contends that the Robinson-Patman Act[20] should have been the Federal statute here charged, rather than the PACA. [Since] the Department of Agriculture has no jurisdiction to enforce the Robinson-Patman Act in an action to cancel respondent's license [, respondent's contention is without merit. We need only consider whether respondent violated the PACA.]

. . .

Respondent argues that complainant has violated respondent's right to notice and due process in this case by failing to advise respondent of the nature of this hearing, the legal authority under which it was held, and the matters of law asserted.

As has been noted, this is a disciplinary proceeding to have respondent's license revoked. It has been determined that a license is a property right which cannot be taken away without notice and due process of law. *Barry v. Barchi,* 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L.Ed.2d 365 (1979). The Administrative Procedure Act also imposes notice and due process requirements on administrative hearings. 5 U.S.C. § 554(b) (1988). The notice and due process requirements are explained as follows:

> Under the Administrative Procedure Act § 5(b), 5 U.S.C. § 554(b), persons entitled to notice of an administrative hearing must be informed of "the matters of fact and law asserted." However, the purpose of the Act is satisfied, and there is not due-process violations, if the party proceeded against "understood the issue" and "was afforded full opportunity" to justify its conduct ....

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[20] 15 U.S.C.A. § 13(c).

*Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885-86 (9th Cir. 1972), *cert. denied*, 412 U.S. 918, 93 S Ct. 2730, 37 L.Ed.2d 144 (1973). Here it is clear that respondent was aware of the "matters of fact and law asserted." The complaint, combined with Complainant's Response to August 2, 1989, Pre-Hearing Order, Complainant's August 9,1989, Response, and Complainant's Proposed Findings of Fact, Conclusion, and Order, informed respondent of complainant's legal theories and the factual allegations thereof. Respondent appeared at the hearing and presented evidence. Respondent then filed Proposed Findings of Fact, Conclusions of Law, and Order, and Brief. Respondent did not make a request for more time to respond. The issues in this case were litigated and respondent had an opportunity to defend itself. Respondent understood the allegations and was afforded full opportunity to respond. Respondent's right to notice and due process have not been violated in this proceeding.

Respondent's failure to submit true and accurate invoices to Magruder and Fresh Value and its failure to account truly and correctly, and make full payment promptly to a consignor, constitute willful violations of the PACA. They also constitute a violation of the implied duties owed by this licensee to its customers. A violation is willful if a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *George Steinberg & Son, Inc., id.* at 994. *See also, The Caito Produce Co.*, 48 Agric. Dec. ___, PACA Docket No. D-88-511 (June 11, 1989). These willful violations warrant the revocation of respondent's license pursuant to 5 U.S.C.A. § 558.

## Conclusion

Respondent has willfully violated 7 U.S.C.A. § 499b of the PACA by making false statements on invoices it submitted to Magruder and Fresh Value, by making false statements on accounting to its consignor M. Offutt Co., and by failing to

account truly and correctly, and make full payment promptly to its consignor, and by violating its implied duty not to corrupt the employees of its customers and by not informing Magruder and Fresh Value of the per package payments to their respective employees.

Accordingly, based on the attached Findings of Fact and Conclusion, the following Order is entered.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends that the evidence does not adequately support the ALJ's findings of fact, but an examination of the record in this proceeding reveals that complainant has shown much more than a preponderance of the evidence to support the allegations of the complaint, which is all that is required.[21]

Respondent contends that its actions did not violate the Act and regulations, and that its due process rights were violated because the Act and regulations are not sufficiently definite. However, I am in agreement with the ALJ's views in this respect.

Respondent further contends that the sanction of revocation is too severe, but here, again, I am in agreement with the ALJ. The serious nature of the violations, and the reasons why respondent's license should be revoked, were explained by James Frazier, Assistant Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA (Tr. 199-203).

For the foregoing reasons, the following order should be issued.

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[21] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

**Order**

The license of Sid Goodman & Company, Inc., is revoked.

This Order shall take effect on the 30th day after service of this Decision and Order on respondent.

Done at Washington, D.C.
September 26, 1990

_____

Donald A. Campbell
Judicial Officer

PACA Docket No. 89-523

# UNITED STATES DEPARTMENT OF AGRICULTURE
# BEFORE THE SECRETARY OF AGRICULTURE

DECIDED: 2/28/90

In re:

Sid Goodman & Company, Inc.,

*Respondent*

## Initial Decision and Order

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, September 6, 1966, 80 Stat. 384, as amended Pub. L. 95-251, March 27, 1978, 92 Stat. 183,[1] and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1989).

The Director of the Fruit and Vegetable Division of the Department's Agriculture Marketing Division, by complaint filed April 18, 1989, alleges that Sid Goodman & Company, Inc., hereinafter the respondent, a licensee of the Department, has willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act, June 10, 1930, c. 436,46 Stat. 531, as amended, Apr. 13, 1934, c. 120,48 Stat. 584; Aug. 20, 1937, c. 719, 50 Stat. 725; June 29, 1940, c. 456, 54 Stat. 696; Oct. 1, 1962, Pub. L. 87-725, 76 Stat. 673; Nov. 4, 1969, Pub. L. 91-107, 83 Stat. 182; Nov. 1, 1978, Pub. L. 95-562, 92 Stat. 2381; Dec. 22, 1981, Pub. L. 97-98, Title XI, 95 Stat. 1269; Oct. 15, 1982, Pub. L. 97-352, 96 Stat. 1667; May 7, 1984, Pub. L. 98-273, 98 Stat. 166, hereinafter the Act, or PACA specifically § 2(4) thereof.[2] The complaint features the monies respondent

[1] 5 U.S.C.A. §§ 554, 557 (West 1977 & Supp. 1989) [hereinafter cited as unofficially codified].

[2] 7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1989) [hereinafter cited as unofficially codified].

gave, surreptitiously, to employees, of two different customers, without notifying those customers, to induce the purchase of perishable agricultural commodities. Specifically, the complaint alleges that respondent gave more than $66,000 to William Crandall, an employee, of Magruder, Inc., and more than $41,000 to Henry Hernandes, an employee of Fresh Value, Inc., in order to induce Messrs. Crandall and Hernandes to purchase perishable agricultural commodities from respondent. The complaint alleges that Messrs. Crandall and Hernandes were authorized to make purchases of produce on behalf of their respective employers. The respondent was advised upon the issuance of the complaint that this conduct warrants the revocation of its license to engage in the sale of produce.

Respondent filed a motion for a more definite statement on May 10, 1989, asking that complainant be required to specify which of the four unnumbered clauses contained in section 2(4) of the PACA that the complaint alleges that respondent had violated. Respondent also filed an answer denying the allegations of the violations.

A pre-hearing order was issued by the administrative law judge on August 2, 1989, requesting that complaint counsel disclose the legal theories supporting the prosecution. Counsel responded on August 2, 1989, that "Respondent violated section 2(4) of the Perishable Agricultural Commodities Act, 1930 . . . by giving money or something of value to employees of two of its customers to induce those employees to make purchases from it on behalf of their employers without informing the employers of this arrangement."[3]

On August 4, 1989, complaint counsel was again requested to clarify the legal theories supporting the case. Counsel responded on August 9, 1989, revealing that respondent's actions would be proved to have violated the first three unnumbered clauses of 7 U.S.C.A. § 499b(4).

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[3] Complainant's response filed August 2, 1989.

An oral hearing was held on September 27-28, 1989, in Washington D.C., before the undersigned. Subsequently, proposed findings and briefs were filed by counsel. To the extent indicated, they are adopted herein. All other proposed findings, conclusions, and arguments are rejected as being irrelevant, or lacking legal or evidentiary bases. In this opinion, "Tr." refers to the transcript of the public hearing. "CX" refers to the numbered exhibits offered by complaint counsel. "RX" refers to the numbered exhibits offered by respondent's counsel.

The United States Department of Agriculture hereinafter the Department, is represented by Edward M. Silverstein, Esq., Washington, D.C. Sid Goodman & Company, Inc. is represented by Edward M. Ruckert, Esq., Neil J. Welch, Jr., Esq., and Jennifer Wirick, Esq., Washington, D.C.

Upon consideration of all matters of record, the following Findings of Fact are made and Conclusions of Law reached. As a result, violations are found as alleged, and there is entered an order as requested by complaint counsel.

## Findings of Fact

1. Respondent, Sid Goodman & Company, Inc., is a corporation engaged in the fresh produce wholesale business. Its address is Maryland Wholesale Produce Market, Bldg. A, Units 2-12, Jessup, Maryland 20194. (Complaint; Answer)

2. Respondent was issued a license numbered 681265 on January 29, 1980, pursuant to section 4 of the PACA. The license has been renewed annually and was next subject to renewal on or before January 29, 1990. (Complaint; Answer; Tr. 31-2; CX 1)

3. Respondent operates as a produce dealer on the Maryland Wholesale Produce Market in Jessup, Maryland. Respondent purchases produce from out-of-state shippers and sells the produce so purchased in the Baltimore and Washington areas. Respondent also accepts produce on consignment from

out-of-state shippers and sells the produce in the Baltimore and Washington areas, on behalf of consignors. Two of respondent's customers are Magruder, Inc. hereinafter Magruder, and Fresh Value, Inc. hereinafter Fresh Value. (Tr. 13-14, 99-100, 101-02, 118; CX 2, 3, 6, 10, 13, 16, 17)

4. The Fruit and Vegetable Division, Agricultural Marketing Service, of the Department, received a complaint from M. Offut Co., Inc., hereinafter referred to as M. Offut Co., 1500 Parker Street, Dallas, Texas 75215, in which M. Offut Co. sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. M. Offut Co. requested that the Department conduct an investigation to determine whether the accounts of sale which respondent presented to it were accurate. (Tr. 13-4, 32-3; CX 2)

5. A Department employee, Mr. James Bright, was assigned to investigate M. Offut Co.'s complaint. Mr. Bright conducted an investigation at respondent's place of business on August 8-9, August 16-19, August 29, and October 4, 1988. (Tr. 13-4, 18-29)

6. During the course of the investigation, Mr. Bright discovered that respondent was making payments to employees of two of its customers. Mr. Bright learned that respondent was paying 25 cents per package for produce purchased on behalf of Magruder, by William Crandall, the produce buyer for Magruder, and on behalf of Fresh Value, by Henry Hernandes, the produce buyer for Fresh Value. Respondent admits, by its answer, that Messrs. Crandall and Hernandes were delegated authority to make produce purchases on behalf of their respective employers. Mr. Bright notified his supervisors, who instructed him to return to the respondent's place of business and obtain clarification and additional information. Mr. Bright continued his investigation on October 17 through November 18, 1988. Mr. Bright was accompanied by Ms. Kathy Feiffer, also an employee of the Department. (Tr. 22-31)

7. William Crandall was employed by Magruder from 1977 through 1988. Magruder operates fourteen retail supermarkets located in Maryland, Virginia and Washington, D.C. In or about 1981, Mr. Crandall was promoted to Assistant Vice President and Produce Buyer for Magruder. Mr. Crandall at all times relevant herein was in charge of the produce operations for Magruder. (Tr. 112-14, 131; RX B, pp. 14-15)

8. From January, 1987 through December, 1987, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27, 36-37) made respondent's checks based on a package calculation (RX B, p. 27), totalling more than $38,000, and issued and gave these checks to Mr. Crandall for the produce he purchased from respondent on behalf of Magruder, in order to induce Mr. Crandall to purchase perishable agricultural commodities from respondent. These payments amounted to more than $27,000 between January, 1988 and September, 1988. (Tr. 22-24, 33-47, 113-14; CX 3, 4, 5, 6, 7, 8, 9, 10) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

9. Mr. Crandall did not inform his superiors at Magruder, that be was receiving a payment per package for the produce he purchased from respondent on behalf of Magruder. (Tr. 116-17, 119, 158-60; RX B, pp. 39-40, 90, 94-96, 99-101)

10. Magruder has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. The policy provides:

> *It will not be permissible for any Store Employee or Manager to accept* or *Solicit Gifts, Premiums, Free Goods* or *Monetary Items* from the *trade* at *any time.* This will include any and everything from a cup of coffee, T-Shirts, Ball Hats and gifts of greater value. As certain vendors will occasionally deliver gifts or premiums to a residence, it will be understood that

such gifts and premiums are property of Magruder and must be turned in to [sic] the office immediately upon their being received.

Obviously the trade does offer up many incentives and premiums from time to time in an effort to increase their volume. In all instances you will be expected to communicate such promotions back to the office and directions will be given on how to handle such deals.

Violations of this policy will result in serious disciplinary action up to and including termination of employment. (RX 1; Tr. 115, 152-55, 231-32)

11. The capital stockholders, directors and officers of Magruder, except Mr. Crandall were not aware that Mr. Crandall was receiving a per package payment from respondent for purchasing perishable agricultural commodities from it on behalf of Magruder. (Tr. 115-17, 119, 159-60; RX, pp. 94-96, 99-101)

12. Mr. Crandall's employment with Magruder terminated in November 1988. (Tr. 114; RX B, pp. 38-39)

13. Henry Hernandes was employed by Fresh Value from 1983 through 1988. Fresh Value operates four retail supermarkets in Virginia and Maryland. Mr. Hernandes was in charge of the produce operations for the company. (Tr. 88-90)

14. From April 1987 through September 1988, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27, 36-37) made respondent's checks, based on a package calculation, totalling more than $41,000, and issued and gave these checks to the spouse of Mr. Hernandes for the produce Mr. Hernandes purchased from respondent on behalf of Fresh Value, in order to induce Mr. Hernandes to purchase perishable agricultural commodities from respondent. (Tr. 22-24, 33-35, 47-53,

89-90, 167-74; CX 11, 12, 13, 14, 15, 16, 17) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

15. Mr. Hernandes did not inform his superiors at Fresh Value, that he was receiving a payment per package for the produce he purchased from respondent on behalf of Fresh Value. (Tr. 91-92, 174-75)

16. Fresh Value has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. (Tr. 90-91)

17. The capital stockholders, directors and officers of Fresh Value, except Mr. Hernandes were not aware that Mr. Hernandes was receiving a payment per package from respondent for purchasing perishable agricultural commodities from it on behalf of Fresh Value. (Tr. 91-92, 110)

18. Mr. Hernandes' employment with Fresh Value terminated in or around November 1988. (Tr. 93)

19. Respondent did not inform either the superiors of Mr. Crandall at Magruder nor the superiors of Mr. Hernandes at Fresh Value that it was giving their respective employees, Messrs. Crandall and Hernandes, a payment per package for produce that each employee purchased from respondent on their employers' behalf. (Tr. 92-94, 119)

20. Respondent's invoices to Magruder and Fresh Value, and respondent's accountings to M. Offut Co. did not reflect respondent's payments to Messrs. Crandall and Hernandes. (Tr. 22-24, 33-53, 167-174; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17)

**Statutes and Regulations**

Respondent is alleged to have violated the PACA in the following specific section:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –
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> . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 499e(c) of this title.[4]

The Secretary's definitions of relevant sections of PACA are expressed in the following regulations:

(y) "Truly and correctly to account" means, in connection with:

(1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by § 46.29.

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(z) "Account promptly," except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

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[4] 7 U.S.C.A. § 499b(4).

* * *

(2) In connection with consignment . . . transactions, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first:

(aa) "Full payment promptly" is the terms used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act means:

(1) Payment of net proceeds for produce received on consignment . . . within 10 days after the date of final sale with respect to each shipment, or within 20 day from the date the goods are accepted at destination, whichever comes first;. . .[5]

The Secretary's regulations further describe the general duties of licensees in the following language:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, expressed or implied, in connection with any transaction handled subject to the Act.[6]

The duties of licensees who accept produce on consignment are outlined as follows:

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[5] 7 C.F.R. § 46.2 (1989).

[6] 7 C.F.R. § 46.26 (1989).

> (a) *General.* All licensees who accept produce for sale on consignment . . . are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner .... Complete and detailed records shall be prepared and maintained by all commission merchants . . . covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of § 46.18 through § 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the Act to fail to render true and correct accounting in connection with consignments .... Charges which cannot be supported by proper evidence in the records of the commission merchant . . . shall not be deducted. The commission merchant . . . may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence of failure to perform any specification or duty, express or implied, arising out of any transaction subject to the Act.[7]

Statutory authority to revoke respondent's license is based on the following:

> (a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or . . . , the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of

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[7] 7 C.F.R. § 46.29(a)(1989).

such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender; . . .[8]

The imposition of sanctions by Federal agencies is restricted by the Administrative Procedure Act. It provides:

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

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[8] 7 U.S.C.A. § 499h(a).

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.[9]

**Discussion**

It is not disputed nor at issue that respondent is a commission merchant, dealer or broker nor that the commodities involved in these transactions were produce, nor that sales and consignments were the means by which these items entered interstate commerce.

At issue is whether respondent violated 7 U.S.C.A. § 2(4) of the PACA in its reporting requirements, (1) by making false statements on the invoices it submitted to its customers, Magruder and Fresh Value, and, (2) by making false statements on accounting to its consignors and by failing to account truly and correctly, and make full payment promptly to those consignors. Also at issue is whether respondent failed to perform an implied duty it owed to its customers, Magruder and Fresh Value. The failure of respondent to not corrupt the employees of Magruder and Fresh Value, and to inform Magruder and Fresh Value of the per package payment to these employees is identified as the failure of an implied duty. The failure of this implied duty presents a novel question, as this is the first case, examining secret payments by a produce supplier to its customers' employees brought under this statute.

The remaining issue resolves the application of 5 U.S.C.A. § 558 to the sanction sought by this action.

> The PACA makes it unlawful in interstate or foreign commerce:

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[9] 5 U.S.C.A. § 558.

> [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity . . . or to fail or refuse truly and correctly to account and to make full payment promptly . . .[10]

This section prohibits submitting false invoices, or false statements therein and making a false and fraudulent accounting. *Michael Scalise, Sr.*, 12 Agric. Dec. 1105 (1953). The evidence indicates that respondent charged its customers, Magruder and Fresh Value, a maximum surcharge of 25 cents per package for produce it sold to them and then recaptured and paid these aggregate sums to Messrs. Crandall and Hernandes. (Tr. 22-24, 33-53, 167-74; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17; RX B, pp. 27, 29) The invoices submitted to Magruder and Fresh Value, by respondent, did not indicate that an additional charge was being made on each package of produce purchased from respondent for payment to their employees. Neither Magruder nor Fresh Value was aware that respondent was giving their employees a per package payment. (Tr. 91-94; 119)

Most frequently the sales prices on the invoices to Magruder exceeded by seventy-five cents, per package, the sales prices listed on the accounting to the consignor, M. Offut Co. on sales to Magruder; 50 cents was paid for freight costs and 25 cents was paid to Mr. Crandall. (Tr. 22-24; CX 3) Respondent did not consider the 25 cents per package payment as part of the sales price it was charging Magruder as it did not include it on the accounting it sent to its consignor. (Tr. 22-24, 33-36; CX 3)

These actions violated the PACA. The invoices submitted to Magruder and Fresh Value were false and misleading and were made for the purposes of fraudulently obtaining a 25 cents per package payment, which was then passed under-the-table to Messrs. Crandall and Hernandes.

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[10] 7 U.S.C.A. § 499b(4).

Respondent has also violated PACA by making false statements on its accounting and by failing to account truly and correctly, and make full payment promptly to a consignor. *Harry Klein Produce Corp.*, 46 Agric. Dec. 134, *aff'd sub nom. Henry Klein Produce Corp. v. U.S.D.A.*, 831 F.2d 403 (2d Cir. 1987). A commission merchant, dealer or broker, in connection with a consignment transaction is required to provide a true and correct statement showing the date of receipt, date of final sale, quantities sold at each price, or other disposition of the produce.[11] "Full payment promptly" requires payment of the net proceeds for produce received on consignment within 10 days after the day on which the last sale was made.[12]

The consignor, M. Offut Co., located in Dallas, Texas, sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. An investigation by the Fruit and Vegetable Division, Agricultural Marketing Service, revealed several discrepancies between that which respondent reported to M. Offut Co. and the respondent's records. The total number of sales of M. Offut Co. property by respondent to its customers, did not equal the total number of packages received by respondent from M. Offut Co. (Tr. 18) This was determined by comparing the number of packages received by respondent from M. Offut Co., which was recorded in respondent's receiving book, to the sales invoices created by the respondent when it sold the produce to Magruder. (Tr. 20-21) There were instances where particular lots were received but not recorded as sold. There were also instances of produce sold that was not recorded as received. (Tr. 21-22)

From these records, it became apparent that sales to Magruder suffered a seventy-five cents discrepancy between the invoice price and the price reported by respondent to M. Offut Co. The accounting submitted to M. Offut Co. did not explain

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[11] 7 C.F.R. § 46.2(y)(1).

[12] 7 C.F.R. § 46.2(aa).

the discrepancy between the sales price charged to Magruder and the sales price reported back to it. The respondent was receiving 25 cents more from Magruder than it was accounting and paying to M. Offut Co.; 50 cents per package was recognized and paid for freight costs. (Tr. 22-24, 33-36; CX 3)

Another violation of the PACA exists upon respondent's failure to perform an implied duty it owed to its customers, Magruder and Fresh Value. This duty was to not to corrupt the employees of these customers, and to inform Magruder and Fresh Value of the per package payment to these individuals.

The PACA makes it unlawful for a commission merchant, dealer, or broker ". . . to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; . . ."[13] The Department's regulations offered as an elaboration of the PACA, specifies that a licensee has the responsibility "... to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act."[14] Thus, the PACA and regulations, both recognize the existence of duties owed by middlemen to their customers and require these licensed cogs to acknowledge the duties they assume with the grant of a license, by both affirmative actions, such as providing accurate tallies, and by displays of restraint, such as avoiding that which is occasionally called "payola."

The plain language of the statute, the point at which interpretation commences, *Mallard v. United States District Court,* 490 U.S. _,109 S. Ct. 1814, 1818, 104 L.Ed.2d 318 (1989) makes it certain that those whose applications have brought them PACA licenses, hold those licenses pursuant to duties, and even in the disjunctive, those duties are expressed or implied. Here, the focus is on implied duties, and whether such are defined; or, indeed, whether such duties need be defined.

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[13] 7 U.S.C.A. § 499b(4).

[14] 7 C.F.R. § 46.26.

The PACA was enacted to protect growers and shippers of fresh fruits and vegetables from a variety of unfair practices engaged in by commission merchants, dealers and brokers. Congress intended to lay down certain rules as to what would be considered fair conduct. 71st Cong. Rec. S2162, S2163 (1929). The primary purpose of the PACA ". . . was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities. *See,* H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)." *Chidsey v. Guerin,* 443 F.2d 584, 587 (6th Cir. 1971); *see also O'Day v. George Arakelian Farms, Inc.,* 536 F.2d 856, 857-58 (9th Cir. 1976); *Harry Klein Produce Corp.,* 46 Agric. Dec. 134, 142, *aff'd sub nom. Harry Klein Produce Corp. v. U.S.D.A.,* 831 F.2d 403 (2d Cir. 1987). The purposes of the PACA are effectuated through a system of licensing with penalties for violations, *George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988 (2d Cir.), *cert. denied,* 419 U.S. 830, 95 S. Ct. 53, 42 L.Ed.2d 55 (1974).

The legislative history also reflects that in enacting the PACA, Congress sought to encourage fair trading practices in the produce industry:

> The Perishable Agricultural Commodities Act was enacted in 1930 to encourage fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudulent business practices in marketing fresh and frozen fruits and vegetables . . . and providing for collecting damages from any buyer or seller who fails to live up to his contractual obligations.

H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1984); *see also* S. Rep. No. 1122, 81st Cong., 1st Sess. 2 (1949); H.R. Rep. No. 1041, 71st Cong., 2d Sess. 2 (1930). The legislative history of PACA does not cast either approbation or censure upon the type of activity displayed by respondent. However, there is an indica-

tion that Congress had, in 1942, a heightened concern about the contractual dealings in the produce industry. The clause ". . . or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction . . ." was added at the same time Congress added the words ". . . and make full payment, . . ." as the result of a Federal court decision. H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942). Congress was so concerned about the contractual relationships between growers on one hand, and commission merchants, dealers and brokers that on the other they made the failure to promptly make payments a violation of the PACA. From this it can be inferred that Congress wanted to assure that general commercial duties to deal fairly would be required of PACA licensees.

This is consistent with the history of the PACA which supports a conclusion that members of the produce industry have an obligation to deal fairly with one another—at arms length; *United Fruit and Vegetable Co.,* 40 Agric. Dec. 396 (1981), *aff'd sub nom. United Fruit and Vegetable Co. v. Director of the Fruit & Vegetable Div.,* 668 F.2d 983 (8th Cir.), *cert. denied,* 456 U.S. 1007,102 S. Ct. 2299, 73 L.Ed.2d 1302 (1982); *The Connecticut Celery Co.,* 40 Agric. Dec. 1131(1981) (to assure equality of bargaining power, the regulations prohibit renegotiation of a contract to extend payment); *Bruce Church, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 676 *(1972); Hastings Potato Growers Assoc. v. M. Singer's Sons Corp.,* 20 Agric. Dec. 734 (1961) (renegotiated contract is voidable when a party to it withholds a material fact he was bound to disclose).

Respondent's per package payment to its customers' employees to induce them to purchase produce is similar to the practice of commercial bribery, which is defined as:

> . . . [T]he "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,'

> be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968)

*National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728 (1977), *aff'd sub nom. National Beef Packing Co. v. Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979).

The practice of commercial bribery has been found to be a violation of the Packers and Stockyards Act[15], *National Beef Packing Co., id.*, and the Robinson-Patman Amendments to the Clayton Act,[16] *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 16 (6th Cir. 1943). It has also been held to be an unfair trade practice under section 5 of the Federal Trade Commission Act[17] , *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939).

Section 5 of the Federal Trade Commission Act prohibits ". . . unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."[18] The term "unfair" is not defined in the Act. Congress intended to a make a broad delegation of power to regulate and control unfair methods of competition. Congress further intended to provide the Federal Trade Commission with broad discretion in interpreting Section 5:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If

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[15] 7 U.S.C.A. § 192 (1988).

[16] 15 U.S.C. § 13(c) (1988).

[17] 15 U.S.C.A. § 45 (1988).

[18] *Id.*

> Congress were to adopt the method of definition, it would undertake an endless task.[19]
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> . . . .

Limitless human inventiveness prevents the Congress from the adoption of legislation specifying each and every type of commercial behavior which might be avoided. Hence, it created a general frame-work and assigned the administrative agencies with specific expertise the tasks of identifying and prohibiting unfair practices. Congress used the terms ". . . express and implied duties . . ." rather than specify all practices that would be a violation of the PACA, for that is an impossible task.

An examination of cases dealing with commercial bribery explains why it has been held to be an unfair trade practice. The matter has been addressed at the Department of Agriculture in *National Beef Packing Co., id* at 1728-29:

> Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying
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> > . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him. It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it ex-

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[19] *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757, 769 (6th Cir. 1966) (citation omitted).

> tremely difficult, if not impossible, to sell the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy... 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

Additional rationale castigating commercial bribery is found in *Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *aff'd sub nom. Holiday Food Services, Inc. v Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decision based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Commercial bribery has been determined to be an unfair trade practice, and Congress' goal in enacting the PACA was to prohibit unfair trading practices in the produce industry. Congress specifically noted that there were to be implied duties. The language "implied duty" may be interpreted to encompass the allegations present here. Respondent owed an implied duty to Magruder and Fresh Value to refrain from corrupting their employees. A PACA licensee is obligated to refrain from offering a payment to a customer's employee to encourage the

employee to purchase produce from it on behalf of the employer. (Tr. 201-02) On the other hand, if the employee seeks such a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer. (Tr. 202,207-11)

The payments by respondent to Messrs. Crandall and Hernandes, without permission of Magruder and Fresh Value is a violation of section 2(4) of the PACA. The payments were made to induce Messrs. Crandall and Hernandes to purchase produce from respondent. Such payments can have the effect of destroying competition in the produce industry since those purchasers receiving kickbacks are most likely to purchase produce from the sellers paying them. Payments such as these can also affect the buyer's decision so that the employee may not be purchasing the best quality produce at the best price for the employer. The practice of payments by respondent was an evil and corrupt practice likely to interrupt the flow of competition and fair dealing in the produce industry.

Counsel to respondent argues that the complaint counsel failed to show that the alleged payments resulted in any inducement. Mr. Crandall received $38,021.95 (CX 4) in checks from respondent during 1987. These checks, 50 in number, were written each week during the calendar year except during the month of September, 1987, and recorded covert activity for most business days of the year. All checks were based on fluctuating quantities at 25 cents, except during October when sums were additionally calculated on quantities at 10 cents. These checks were signed by 3 different individuals named Goodman and were endorsed by William, and often, Dorothy Crandall. During 1987, the smallest check drawn on respondent and made payable to William Crandall was $236; the largest was $1,549. Each check, which passed through Mr. Crandall's financial institutions contained a memo section which related the amount of the check to invoices and shipment records of produce sold daily to Magruder by respondent. (CX 4, 5, 6) The frequency of

the dates on which respondent incurred a liability to Mr. Crandall is sufficient to establish that Mr. Crandall had established a proprietary interest in the commercial relationships which existed between respondent and Magruder. Respondent paid Mr. Crandall more than $100 for each day Magruder had its doors open for business. In 1987, beginning in April, and continuing through December, checks were also written each week by 3 different individuals named Goodman to Jennifer Hernandes, the spouse of Fresh Value's produce buyer, Henry Hernandes. These checks were for amounts exceeding $16,000. In the latter part of 1987, these monies were returned to respondent in payment for purchases of produce which the Hernandes' began selling to a trade other than that serviced by Fresh Value. Hence, respondent's payoffs to Henry Hernandes which were an expense to Fresh Value as a cost of goods sold, were used in a speculative venture potentially in competition with Mr. Hernandes' employer, Fresh Value. (CX 11-13; Tr. 47-50, 168-171)

Respondent's counsel contends that officials of Magruder and Fresh Value authorized secret payments to their produce buyers. Stanford Steppa, Executive Vice President and co-owner of Magruder, and Leopoldo Alonza's, President and owner of Fresh Value denied knowledge of these payments. Counsel contends the testimony of these individuals is not credible, relying instead on the deposition of William Crandall to argue that Mr. Steppa knew of the payments from respondent to Mr. Crandall. (RX B) Counsel would thrust credibility upon Mr. Crandall's deposition because statements were made against his interest.

Messrs. Steppa and Alonza appeared at the hearing. I saw and heard them testify and I determine that their testimony was entirely credible. I did not have a chance to see or hear Mr. Crandall, even though a subpoena was issued to compel his attendance. (RX A) A deposition by Mr. Crandall, given in a

private civil case, was offered by respondent's counsel and received into evidence. He was not cross-examined by complaint counsel. However, a thorough examination of the deposition results in the conclusion that in fact Mr. Crandall did not inform Mr. Steppa of the per package payment he had received from respondent. (RX B, pp. 39-40, 90, 94-96, 99-101) This evidence combined with the testimony of Mr. Steppa indicates that Mr. Steppa did not have knowledge that respondent's employees were paying Mr. Crandall for each package of produce purchased from it. (Tr. 115-17, 119, 158-60) The evidence also substantiates that Mr. Alonza of Fresh Value did not know that respondent was making the payments to Mr. Hernandes. (Tr. 91-92, 110, 174-75) In fact, Jennifer Hernandes, testified that she and her husband, Henry, went to great length's to prevent Mr. Alonzo from learning of the payments they were receiving from respondent. (Tr. 171, 174-75)

It is relevant that officers and employees of respondent did not offer testimony in defense of their actions. (Tr. 195) Mr. David Goodman who issued checks on behalf of respondent to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 37,40, 43, 106, 145) appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mrs. Donna Goodman, who also issued checks on behalf of respondent, to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 49, 61, 67) likewise appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mr. Leon Goodman, who also issued checks to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 46, 55, 64, 91, 100, 115) was not subpoenaed. A negative inference may be drawn from this failure of evidence; *Ludwig Casca,* 34 Agric. Dec. 1917, 1929 (1975). Respondent's witnesses who are employees of Sid Goodman & Company, Inc., all refused to testify and invoked the protection of the Fifth Amendment of the United States Constitution. In civil cases, a negative inference may be drawn from the refusal of a witness

to testify. *Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976). These witnesses were the only witnesses who could have testified that they had informed Magruder and Fresh Value of the payments, but they chose not to offer their testimony.

Respondent's counsel argues that Messrs. Steppa and Alonzo should have known about the payments from respondent to their employees, because they themselves have accepted payoffs. (Tr. 91, 103-05, 114-17, 151, 153-54, 224-27, 240, 250) Respondent's counsel states that it is a common practice in the produce industry to influence a buyer's decision with payoffs. However, the examples which respondent cites as so-called payoffs are supplier promotions and incentive awards occasionally given to customers by produce suppliers. Two of the examples consisted of cash payments. (Tr. 103-04, 117) In each example, Messrs. Steppa and Alonzo were aware of the payments and allowed them. (Tr. 90-91, 115, 152-55, 231-32; RX 1)

Respondent's counsel argues that as a matter of law, Magruder and Fresh Value are charged with the knowledge of the payments from respondent to Messrs. Crandall and Hernandes. Respondent cites to 7 U.S.C.A. § 499p and 7 C.F.R. § 46.41 which refer to acts committed by agents of licensees, i.e. commission merchants, dealers and brokers. Respondent argues that these also obtain application to customers and employees of the licensees. However, the licensee in this case is respondent, not its customers. Therefore, these sections are inapplicable.

For support of its argument that knowledge of the secret payments ought to be imputed to Magruder and Fresh Value, respondent cites to cases discussing general agency law that a principal is liable for the acts of its agent. These cases refer to a situation where the agent is acting with apparent authority and is able to bind the principal. However, four of the five PACA reparation decisions cited by respondent, held that an agent

acting within the scope of this apparent authority bound his principal where a party relied in good faith and would have suffered a loss had the agency relationship not been upheld. *Tom Moore Co. v. Amigomex, Inc.*, 42 Agric. Dec. 1668 (1983); *Western Cold Storage Co. v. Schons*, 38 Agric. Dec. 903 (1979); *George Arakelian Farms, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 1395 (1972); *Nach-DeCamp Co. v. S. Albertson Co.*, 13 Agric. Dec. 283(1954). The fifth case does not present facts which are comparable to the facts here. *See Southland Produce Co. v. Delta Packing Co.*, 41 Agric. Dec. 981 (1982).

In this case, the Goodman drafted checks to Mr. Crandall and Mrs. Hernandes personally, not to Magruder or Fresh Value. Indeed the checks to Mrs. Hernandes were written so as to assure that her husband's supervisors at Fresh Value would not have knowledge of this scheme. (Tr. 172) There is no evidence that either Magruder or Fresh Value authorized their employees to act as their agents in accepting the per package payment from respondent, or even that Messrs. Crandall and Hernandes purported to represent their employers in entering into the illicit agreements with respondent.

Respondent's counsel contends that the Robinson-Patman Act,[20] should have been the Federal statute here charged, rather than the PACA. This position is advanced even though the Department of Agriculture has no jurisdiction to enforce the Robinson-Patman Act in an action to cancel respondent's license.

One reason to reject this argument was recently expressed in *SSG Fred Boswell, II*, 49 Agric. Dec.____, P.Q. Docket No. 331, February 6, 1990. In the *Boswell* case, the Department's Judicial Officer determined that it is but harmless error for a respondent to suffer a civil penalty upon an affirmative answer to a complaint which neither alleged the violation of any statute punishable by civil penalty, nor cited to any statute or

[20] 15 U.S.C.A. § 13(c).

Departmental regulation authorizing the imposition of a civil penalty, if the respondent knew and had an opportunity to respond to the factual predicate supporting the imposition a sanction. So, even if the Robinson-Patman Act were alleged to be violated, the sanction sought shall be imposed,[21] because in this case, following *Boswell*, the respondent had a full opportunity to be apprised of the issues in controversy. Complaint counsel twice explained his theory of the case.[22] The allegations of the complaint were clear: ". . . by paying, . . . an employee . . . in order to induce . . . to purchase perishable agricultural commodities , . . ." respondent was put on notice of facts that compelled a defense, a defense which respondent did pursue.

Another reason to reject this contention is that the PACA was intended by Congress to protect growers from the financial ruin which could be their lot should their produce be sold through unscrupulous middlemen. Congress was intent on protecting those whose efforts provide the nation's nourishment. If the farmers are not paid for their labors, the entire country will suffer. Since the Congress wishes the Department of Agriculture to require a course of fair-dealing which will assure the farmers recompense, the Department must be able to deny licenses to those willing to establish commercial competitive dealings on standards other than price, quality and service. Payoffs, such as those described in this case, will denude the wholesalers and other middlemen of the efficiencies and profits which they need in order to perform their vital and unduplicated functions in the nation's distribution system. Payoffs are irrevocable and intractable and will ultimately lead to the failure of the wholesaler because those who benefit from them will never be satisfied. The insidious demands of these hidden annuitants are fueled by greed and their appetites are insatiable.

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[21] 15 U.S.C.A. § 13(c).

[22] August 2, 1989; August 9, 1989.

Indeed, the evidence in this case displays that Mr. Crandall was paid additional levies on an additional basis in October, 1987. (CX 4) Once undermined by hidden destructive demands, the wholesaler will fail, and the farmer will be unpaid.

Therefore, since the Congress intended the PACA to be more than patina deep, wholesalers who expose themselves by ignoring duties to their customers, are not worthy to hold the Department's license.

Respondent argues that complainant has violated respondent's right to notice and due process in this case by failing to advise respondent of the nature of this hearing, the legal authority under which it was held and the matters of law asserted.

As has been noted this is a disciplinary proceeding to have respondent's license revoked. It has been determined that a license is a property right which cannot be taken away without notice and due process of law. *Barry v. Barchi,* 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L.Ed.2d 365 (1979). The Administrative Procedure Act also imposes notice and due process requirements on administrative hearings. 5 U.S.C. § 554(b) (1988). The notice and due process requirements are explained as follows:

> Under the Administrative Procedure Act § 5(b), 5 U.S.C. § 554(b), persons entitled to notice of an administrative hearing must be informed of "the matters of fact and law asserted." However, the purpose of the Act is satisfied, and there is not due-process violations, if the party proceeded against "understood the issue" and "was afforded full opportunity" to justify its conduct . . . .

*Golden Grain Macaroni Co. v. F.T.C.,* 472 F.2d 882, 885-86 (9th Cir. 1972), *cert. denied,* 412 U.S. 918, 93 S. Ct. 2730, 37 L.Ed.2d 144 (1973). Here it is clear that respondent was aware of the "matters of fact and law asserted." The complaint com-

bined with Complainant's Response to August 2, 1989 Pre-Hearing Order, Complainant's August 9, 1989 Response, and Complainant's Proposed Findings of Fact, Conclusion, and Order, informed respondent of complainant's legal theories and the factual allegations thereof. Respondent appeared at the hearing and presented evidence. Respondent then filed Proposed Findings of Fact, Conclusions of Law, and Order, and Brief. Respondent did not make a request for more time to respond. The issues in this case were litigated and respondent had an opportunity to defend itself. Respondent understood the allegations and was afforded full opportunity to respond. Respondent's right to notice and due process have not been violated in this proceeding.

Respondent's failure to submit true and accurate invoices to Magruder and Fresh Value and its failure to account truly and correctly, and make full payment promptly to a consignor constitute willful violations of the PACA. They also constitute a violation of the implied duties owed by this licensee to its customers. A violation is willful if a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *George Steinberg & Son, Inc., id.* at 994. *See also The Caito Produce Co.,* 48 Agric. Dec.____, PACA Docket No. D-88-511 (June 11, 1989). These willful violations warrant the revocation of respondent's license pursuant to 5 U.S.C.A. § 558.

## Conclusion

Respondent has willfully violated 7 U.S.C.A. § 499b of the PACA by making false statements on invoices it submitted to Magruder and Fresh Value, by making false statements on accounting to its consignor M. Offut Co. and by failing to account truly and correctly, and make full payment promptly to its consignor, and by violating its implied duty not to corrupt the employees of its customers and by not informing Magruder and

Fresh value of the per package payments to their respective employees.

Accordingly, based on the attached Findings of Fact and Conclusion, the following Order is entered.

**Order**

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in the Rules of Practice. 7 C.F.R. § 1.145 (1989).

Copies hereof shall be served upon respondent and counsel.

_____

PAUL KANE
Administrative Law Judge

February 28, 1990

## 5 U.S.C. § 706

**§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall he taken of the rule of prejudicial error.

## 7 U.S.C. § 192

### § 192. Unlawful practices enumerated

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device.

## 7 U.S.C. § 227

**§ 227. Powers and duties of Federal Trade Commission and Secretary of Agriculture; reports**

(a) The Federal Trade Commission shall have power and jurisdiction over any matter involving meat, meat food products, livestock products in unmanufactured form, or poultry products, which by this Act...] is made subject to the power or jurisdiction of the Secretary, as follows:

(1) When the Secretary in the exercise of his duties requests of the Commission that it make investigations and reports in any case.

(2) In any investigation of, or proceeding for the prevention of, an alleged violation of any Act administered by the Commission, arising out of acts or transactions involving meat, meat food products, or livestock products in unmanufactured form, if the Commission determines that effective exercise of its power or jurisdiction with respect to retail sales of any such commodities is or will be impaired by the absence of power or jurisdiction over all acts or transactions involving such commodities in such investigation or proceeding. In order to avoid unnecessary duplication of effort by the Government and burdens upon the industry, the Commissioner shall notify the Secretary of such determination, the reasons therefor, and the acts or transactions involved, and shall not exercise power or jurisdiction with regard to acts or transactions (other than retail sales) involving such commodities if the Secretary within ten days from the date of receipt of the notice notifies the Commission that

there is pending in his Department an investigation of, or proceeding for the prevention of, an alleged violation of this Act . . . involving the same subject matter.

(3) Over all transactions in commerce in margarine, oleo-margarine, or poultry products and over retail sales of meat, meat food products and livestock products in unmanufactured form.

(b) The Federal Trade Commission shall have no power or jurisdiction over any matter which by this Act . . . is made subject to the jurisdiction of the Secretary, except as provided in subsection (b) of this section [subsec. (a) of this section].

(c) The Secretary of Agriculture shall exercise power or jurisdiction over oleomargarine or retail sales of meat, meat food products, or livestock products in unmanufactured form only when he determines, in any investigation of, or any proceeding for the prevention of, an alleged violation of this Act [7 USCS §§ 181 et seq.], that such action is necessary to avoid impairment of his power or jurisdiction over acts or transactions involving livestock, meat, meat food products, livestock products in unmanufactured form, or poultry other than retail sales thereof. In order to avoid unnecessary duplication of effort by the Government and burdens upon the industry, the Secretary shall notify the Federal Trade Commission of such determination, the reasons therefor, and the acts or transactions involved, and shall not exercise power or jurisdiction with respect to acts or transactions involving oleomargarine or retail sales of meat, meat food products, or livestock products in unmanufactured form if the Commission within 10 days from the date of receipt of such notice notifies the

Secretary that there is pending in the Commission an investigation of, or proceeding for the prevention of, an alleged violation of any Act administered by the Commission involving the same subject matter.

(d) The Secretary of Agriculture shall exercise jurisdiction over poultry products only in a proceeding brought under section 207 or section 410 when such action is necessary to avoid impairment of his jurisdiction.

(e) The Secretary of Agriculture and the Federal Trade Commission shall include in their respective annual reports information with respect to the administration of subsections (b), (d), and (e) of this section [subsecs. (a), (c), and (d) of this section].

## 7 U.S.C. § 499b

### § 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce;

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce;

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with

any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title;

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce: *Provided,* That any commission merchant, dealer, or broker who has violated –

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited in the Treasury of the United States as miscellaneous receipts;

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced;

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

## 7 C.F.R. § 46.26

**§ 46.26 Duties of licensees.**

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**
**United States Courthouse**
**Tenth and Main Streets**
**Richmond, Virginia 23219**

JOHN M. GREACEN
Clerk

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November 6, 1991

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Re: No. 90-2209, Sid Goodman & Co. v. US

Dear Counsel:

The Court has reviewed government counsel's request for publication of its opinion. I have been directed by the Court to inform counsel that the Court considered the government's request but declines to publish the opinion.

Yours truly,

JOHN M. GREACEN
Clerk

By: Scott A. Richie
Scott A. Richie
Counsel for Clerk's Office

SAR:pl

**United States Department of Agriculture**
**Office of the General Counsel**
**Washington, D.C. 20250-1400**

October 4, 1991

Mr. John M. Greacen
Clerk
United States Court of Appeals
for the Fourth Circuit
United States Courthouse
Tenth and Main Streets
Richmond, Virginia 23219

Dear Mr. Greacen:

Re: Sid Goodman & Company, Inc. v. United States of America, 4th Cir. No. 90-2209

On October 1, 1991, this Court (Circuit Judges Widener and Niemeyer, and Senior District Court Judge Young) entered an unpublished opinion in the above-captioned appeal. The government, after consideration and consultation, believes the opinion could offer helpful guidance to both United States Department of Agriculture officials responsible for administering the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §499 *et seq.*, and PACA licensees whose conduct must conform to the requirements of the statute. Accordingly, the government respectfully requests that the opinion be published so that it may be cited as precedent.

This opinion addresses an issue of first impression, marking the first instance in which a court of appeals has ruled on the scope of the PACA's implied duties clause. Specifically, this opinion marks the first time a court of appeals has addressed the issue of whether the Secretary of Agriculture can construe the

PACA's implied duties clause to proscribe commercial bribery among PACA licensees. The scope of the implied duties clause is an issue of great importance to the Department of Agriculture and to the administration of the PACA. This Court's opinion in this appeal, if published, will provide useful guideposts to PACA administrators charged with ensuring fairness and equity among PACA licensees. Additionally, the PACA has national application and effect, and a published opinion would provide persuasive guidance for other circuit courts of appeal.

Issues regarding the scope of the implied duties clause in the commercial bribery context have arisen in PACA litigation currently pending before the Fourth Circuit. *Tipco, Inc. v. United States Department of Agriculture,* 4th Cir. No. 91-1435. The government believes the *Goodman* opinion would be helpful to this Court as it considers the issues raised in *Tipco.*

Please call this letter to the attention of the panel. As indicated, a copy of this letter has been mailed today to the petitioner.

Sincerely,

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Supreme Court, U.S.
FILED
FEB 18 1992
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No. 91-1162

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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SID GOODMAN & COMPANY, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE; and EDWARD MADIGAN, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## AMICUS CURIAE BRIEF OF TIPCO, INC. IN SUPPORT OF PETITIONER

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UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE; and EDWARD MADIGAN, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## AMICUS CURIAE BRIEF OF TIPCO, INC. IN SUPPORT OF PETITIONER

---

Amicus Curiae, TIPCO, Inc. (hereinafter "TIPCO"), pursuant to Supreme Court Rule 37, files this Amicus Curiae Brief in support of the petition for a writ of certiorari filed by Sid Goodman & Company, Inc.[1] TIPCO respectfully prays that this Court grant the petition for a writ of certiorari to review the judgment of the United

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[1] Pursuant to Supreme Court Rule 37.2, Amicus Curiae TIPCO obtained the written consent of all parties involved in this proceeding to file this brief. Contemporaneous with the filing of this brief in support of the petition for a writ of certiorari, TIPCO filed letters of consent it received from the petitioner and the respondents.

States Court of Appeals for the Fourth Circuit entered in this proceeding.

## INTEREST OF AMICUS CURIAE

Amicus Curiae, TIPCO, a PACA licensee, is a wholesale supplier of produce located in the Maryland Wholesale Produce Market in Jessup, Maryland.[2] The Director of the Fruits and Vegetable Division of the Agricultural Marketing Service filed complaints against Sid Goodman & Co. (hereinafter "Goodman") initially, and thereafter, filed its complaint against TIPCO alleging that Goodman and TIPCO's activities violated Section 2(4) of the Perishable Agricultural Commodities Act of 1930 (hereinafter "PACA") (7 U.S.C. § 499(b)(4) (West Supp. 1991).

On February 28, 1990, Administrative Law Judge Kane in the Goodman case determined that Goodman violated the PACA and revoked Goodman's license. In contrast, on April 19, 1990, Administrative Law Judge Hunt concluded that "TIPCO did not violate the Perishable Agricultural Commodities Act, 1930 as amended" and therefore, "dismissed the complaint and amended complaint." Thereafter, the Judicial Officer Donald A. Campbell reversed that finding and revoked TIPCO's license noting his concern that affirming the Administrative Law Judge's decision would not send the right "message" to "this multi-billion dollar industry." *See In re TIPCO*, 50 Agric. Dec. at 908.

On January 30, 1992, the United States Court of Appeals for the Fourth Circuit affirmed the Judicial Officer's decision in *TIPCO* in an unreported per curiam opinion. *See TIPCO, Inc. v. USDA*, No. 91-1435 (4th Cir., filed January 30, 1992). Thereafter, TIPCO filed a timely petition for rehearing and suggestion for rehearing in

[2] The petitioner, Sid Goodman & Co. is also a produce business which operates its wholesale fruit and vegetable dealership at the Jessup produce market.

banc. To date, no decision has been rendered by the Court of Appeals for the Fourth Circuit on TIPCO's petition. Assuming *arguendo* that TIPCO's petition is denied, TIPCO intends to file a petition for a writ of certiorari with this Court. Said petition will include, *inter alia*, many of the arguments raised by the petitioner here in the extant petition.

## SUMMARY OF ARGUMENT

Without predicate in the legislative history, precise statutory language or any regulation, the petitioner is subject to the ultimate sanction, i.e., the loss of its license. That result violates the teaching of *SEC v. Chenery Corp.*, 332 U.S. 194 (1946) and its progeny. Amicus Curiae, TIPCO respectfully prays that this Court grant the petition for a writ of certiorari so as to further examine and define the distinctions in regulatory activity by way of statutes, rules or regulations as opposed to "ad hoc" litigation.

## ARGUMENT

In the *Goodman* and *TIPCO* cases, the United States Court of Appeals for the Fourth Circuit announces a novel interpretation of the Perishable Agricultural Commodities Act. In so doing, the United States Court of Appeals for the Fourth Circuit improperly discounted the significance of *SEC v. Chenery Corp.*, 332 U.S. 184 (1947) and its progeny in permitting the resolution of this admittedly novel [3] issue through the administrative adjudicatory process instead of through the promulgation of a rule, regulation or statute.

Because the Department of Agriculture (hereinafter "the Department") deems that it cannot condone the payment of money from a licensee to the produce buyer

[3] The Department of Agriculture in both the *TIPCO* and *Goodman* cases has acknowledged that the substantive issues involved in these cases are "novel."

for a grocery chain, it has created a violation of a statute that has never been interpreted before to apply to such activity. Indeed, the Department acknowledges that it has never before suggested that the activities of the petitioner or TIPCO violate the PACA. Moreover, the Department failed to deter such conduct by regulations, policy statements or any other means that would have provided PACA licensees with prior notice of the Department's new-minted position. Instead, the first notice to PACA licensees that the Department interpreted the activities of the petitioner to violate the "implied duties" clause of the PACA has been this case and the companion case of TIPCO.

The Department's actions were not a rule-making exercise. Nevertheless, a new "rule" was divined. Unpublished and uncodified standards of conduct have become the predicate for the ultimate sanction of revocation of the petitioner's license. The 50 years since the enactment of the amendment to the PACA which added the "implied duties" clause to 7 U.S.C. § 499(b)(4) have yielded no reported case or a regulation interpreting or expanding the ambit of the statute to cover the circumstances at bar.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(4)

No. 91-1162

Supreme Court, U.S.
FILED
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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SID GOODMAN & COMPANY, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether petitioner's conduct in bribing the purchasing agents of retail produce businesses, to induce the agents to buy produce from petitioner, violates Section 2(4) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499b(4), which prohibits PACA licensees, such as petitioner, from "fail[ing], without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any" transaction involving perishable agricultural commodities.

2. Whether, in interpreting Section 2(4) of PACA to prohibit commercial bribery, the Secretary of Agriculture properly proceeded by adjudication rather than by rulemaking.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 12 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939) | 8 |
| *Arkansas* v. *Oklahoma*, No. 90-1262 (Feb. 26, 1992) | 9 |
| *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) | 4, 9 |
| *Farley & Calfee, Inc.* v. *Department of Agriculture*, 941 F.2d 964 (9th Cir. 1991) | 7 |
| *Ford Motor Co.* v. *FTC*, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982) | 11 |
| *Frio Ice, S.A.* v. *Sunfruit, Inc.*, 918 F.2d 154 (11th Cir. 1990) | 7 |
| *Grace* v. *E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976) | 8 |
| *Harry Klein Produce* v. *Department of Agriculture*, 831 F.2d 403 (2d Cir. 1987) | 7 |
| *Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986), aff'd *sub nom. Holiday Food Service, Inc.* v. *Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987) | 8-9 |
| *Martin* v. *OSHRC*, 111 S. Ct. 1171 (1991) | 10 |
| *National Beef Packing Co.*, 36 Agric. Dec. 1722 (1977), aff'd *sub nom. National Beef Packing Co.* v. *Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979) | 8, 9 |
| *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) | 10, 11 |

Cases—Continued: Page

*NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) ..... 10
*SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947) ..... 10, 11
*Stoller* v. *CFTC*, 834 F.2d 262 (2d Cir. 1987) ..... 11
*Tipco, Inc.* v. *Yeutter*, No. 91-1435 (4th Cir. 1992) ..... 5
*Tri-County Wholesale Produce Co.* v. *Department of Agriculture*, 822 F.2d 162 (D.C. Cir. 1987) ..... 7
*W.J. Westcott Co.* v. *Yonk Rubin & Son*, 122 F. Supp. 888 (E.D. Pa. 1954) ..... 5

Statutes and regulation:

Act of Apr. 6, 1942, ch. 211, 56 Stat. 200 ..... 7
Federal Alcohol Administration Act § 5(c), 27 U.S.C. 205(c) ..... 8
Packers and Stockyards Act § 202, 7 U.S.C. 192 ..... 8
Perishable Agricultural Commodities Act, ch. 436, § 1, 46 Stat. 531, 7 U.S.C. 499a *et seq.* ..... 2, 6
§ 2(4), 7 U.S.C. 499b(4) ..... 2, 3, 5, 6, 7, 8, 9, 10
§ 7h(a), 7 U.S.C. 499h(a) ..... 3
Robinson-Patman Act § 2(c), 15 U.S.C. 13(c) ..... 8
7 C.F.R. 46.26 (1991) ..... 6, 11

Miscellaneous:

2 R. Callman, *The Law of Unfair Competition, Trademarks and Monopolies* (3d ed. 1967) ..... 8
88 Cong. Rec. (1942):
p. 290 ..... 7
pp. 2519-2520 ..... 7
p. 3173 ..... 7
H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930) ..... 6
H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942) ..... 7
H.R. Rep. No. 543, 98th Cong., 1st Sess. (1983) ..... 6
S. Rep. No. 1188, 77th Cong., 2d Sess. (1942) ..... 7

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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SID GOODMAN & COMPANY, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The per curiam opinion of the court of appeals, Pet. App. 2a-14a, is unpublished but the decision is noted at 953 F.2d 639 (Table). The decision and order of the Secretary of Agriculture (Secretary), Pet. App. 15a-44a, is reported at 49 Agric. Dec. 1169. The initial decision and order of the Administrative Law Judge (ALJ), Pet. App. 45a-74a, is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 5, 1991. The petition for a writ of certiorari was filed on January 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a wholesale distributor of agricultural produce and is licensed pursuant to the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499a *et seq.* In 1988, petitioner sold five lots of melons on consignment for M. Offutt Co., Inc. (Offutt). Offutt later complained to the United States Department of Agriculture (USDA) that petitioner had furnished inaccurate accounts of sale with respect to those transactions. The USDA investigated the matter and determined that petitioner failed to make full and prompt payment to Offutt of over $5000. Pet. App. 3a-4a.

In the course of the investigation, the USDA also discovered that petitioner was bribing the purchasing agents of Magruder, Inc. (Magruder) and Fresh Value, Inc. (Fresh Value), to induce the agents to buy produce from petitioner rather than from competitors. The scheme worked as follows. Petitioner would mark up the price of produce sold to Magruder and Fresh Value by 25 cents per package. Petitioner would then pay that premium to the purchasing agent as a "kickback." Afterwards, petitioner would fail to report the mark-ups on the invoices submitted to Magruder, Fresh Value and Offutt. The payments to the purchasing agents totalled $107,000 over a 20-month period. Pet. App. 3a-5a.

2. The USDA filed an administrative complaint against petitioner seeking revocation of petitioner's PACA license. The USDA charged that petitioner flagrantly and repeatedly violated the first three unnumbered clauses of Section 2(4) of PACA, 7 U.S.C. 499b (4).[1] Specifically, the USDA alleged that petitioner:

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[1] The Secretary is authorized to revoke a PACA license when the licensee's violations of the statute are "flagrant or

(1) made false statements on invoices submitted to Magruder, Fresh Value, and Offutt; (2) failed to correctly account and make full and prompt payment to Offutt; and (3) breached an implied duty owed to Magruder and Fresh Value to refrain from bribing their employees. Pet. App. 4a-5a. The ALJ conducted a hearing and concluded that petitioner had violated PACA as alleged. *Id.* at 57a-59a. Based on the three violations of Section 499b(4), the ALJ revoked petitioner's PACA license. Pet. App. 72a-74a. On appeal, the Secretary affirmed the ALJ. *Id.* at 15a-44a.[2]

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repeated." 7 U.S.C. 499h(a). Section 2(4) of PACA, 7 U.S.C. 499b(4), provides in relevant part as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * *
>
> (4) For any commission merchant, dealer, or broker [1] to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or [2] to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or [3] to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction * * *.

[2] Petitioner asks this Court to review only the third of three findings supporting the Secretary's decision to revoke petitioner's PACA license. See Pet. 7 n.11. There is certainly reason to believe that the Secretary would have revoked petitioner's license based on the first and second PACA violations alone since he found that these violations were "willful." See

3. The court of appeals affirmed the Secretary in an unpublished per curiam decision. Pet. App. 2a-14a. The court held that the Secretary's interpretation of PACA—as prohibiting commercial bribery—comports with the statute's plain language and legislative history. The court further decided that, in any event, the Secretary's construction of the statute is permissible and is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 7a-10a. Finally, the court concluded that the Secretary had properly proceeded by adjudication rather than by rulemaking. *Id.* at 11a-12a.[3]

## ARGUMENT

The petition presents two questions. The first is whether the Secretary erred in interpreting the "implied duty" clause of PACA to prohibit commercial bribery by produce sellers licensed under the statute. The second is whether the Secretary, in adopting that interpretation, properly proceeded by adjudication rather than by rulemaking. The court of appeals, in a well reasoned decision, held that the Secretary's construction of PACA was not only permissible but correct, Pet. App. 7a-10a, and found that it was properly made in the course of the adjudication, *id.* at 11a-12a. Neither question involves a split in circuit

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Pet. App. 42a. The Secretary's opinion does not address this issue, however.

[3] In addition, the court rejected several arguments that petitioner no longer advances: (1) that PACA violates due process; (2) that the invoices petitioner submitted to Magruder and Fresh Value were not "false statements" within the meaning of PACA; and (3) that petitioner's conduct was neither "willful" nor sufficiently "flagrant or repeated" to warrant revocation of its PACA license. Pet. App. 10a-14a.

authority; only one other decision has applied PACA to commercial bribery,[4] and that unpublished decision is consistent with the unpublished decision in this case. Finally, the questions presented are of limited significance. Further review is therefore unwarranted.

1. Petitioner claims that the Secretary's interpretation of PACA's "implied duty" clause conflicts with the plain language of the statute and with its legislative history. Pet. 8-16. That contention is meritless.

a. The "implied duty" clause provides as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * *
>
> (4) For any commission merchant, dealer, or broker * * * to fail, without reasonable cause, to perform *any* specification or duty, express or implied, arising out of *any* undertaking in connection with any such transaction * * *.

7 U.S.C. 499b(4) (emphasis added). Section 499b(4) makes it unlawful for PACA licensees to fail to perform "any" implied duty arising out of "any" undertaking in connection with a transaction involving perishable agricultural commodities. 7 U.S.C. 499b (4).[5] Congress did not specify what duties PACA licensees owe the parties to such transactions, and

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[4] See *Tipco, Inc.* v. *Yeutter*, No. 91-1435 (4th Cir. Jan. 30, 1992) (per curiam) (unpublished), slip op. 5-6 (affirming Secretary's revocation of the PACA license of another produce seller who bribed Magruder's purchasing agent).

[5] Only one published decision has addressed this provision of PACA. See *W.J. Westcott Co.* v. *Yonk Rubin & Son*, 122 F. Supp. 888, 891-892 (E.D. Pa. 1954) (noting broad language of clause and upholding Secretary's interpretation of it in that case).

its decision to leave the matter open undoubtedly was deliberate. As the court of appeals held, the broad language of Section 499b(4) reflects Congress's intention to ban a wide range of undesirable practices in the produce market, and to "afford the Secretary the authority to exercise the expertise and discretion necessary to regulate specialized problems that may arise in the perishable agriculture commodities industry on a case-by-case basis." Pet. App. 7a.[6]

The legislative history of the "implied duty" clause is sparse, but what little exists supports the Secretary's interpretation of the provision. PACA was enacted in 1930, see Perishable Agricultural Commodities Act, ch. 436, § 1, 46 Stat. 531, to suppress "unfair and unethical practices," and to force produce merchants "to conduct [their] business[es] according to long-established principles of honesty and fair dealing." H.R. Rep. No. 1041, 71st Cong., 2d Sess. 2 (1930).[7] The "implied duty" clause was

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[6] Consistent with that aim, the Secretary has promulgated the following regulation:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. 46.26.

[7] See also H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1983) ("The Perishable Agricultural Commodities Act was enacted in 1930 to encourage fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudu-

added by amendment in 1942. See Act of Apr. 6, 1942, ch. 211, 56 Stat. 200. The amendment was prompted by a federal court's restrictive interpretation of the preceding clause in Section 499b(4), regarding the duty to "account." See S. Rep. No. 1188, 77th Cong., 2d Sess. 1-3 (1942); H.R. Rep. No. 1840, 77th Cong., 2d Sess. 1-2 (1942). The court had held that the duty to "account" did not entail a duty to make full payment. S. Rep. No. 1188, *supra*, at 2. In response to that decision, Congress inserted the words "and make full payment" after "account." *Id.* at 3. Congress then went a step further and added the "implied duty" clause, with its language of general prohibition, to the end of Section 499b(4). H.R. Rep. No. 1840, *supra*, at 3. Given the context of the 1942 changes, it is likely that Congress intended the "implied duty" clause to expand the reach of the statute to further the initial purpose of prohibiting "unfair and unethical practices." [8]

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lent business practices."); *Farley & Calfee, Inc.* v. *Department of Agriculture*, 941 F.2d 964, 966 (9th Cir. 1991) (PACA "was aimed at preventing unfair business practices and promoting financial responsibility in the fresh fruit and produce industry."); *Frio Ice, S.A.* v. *Sunfruit, Inc.*, 918 F.2d 154, 155 (11th Cir. 1990) ("Congress enacted PACA in 1930 to encourage fair trading practices in the marketing of perishable commodities."); *Harry Klein Produce* v. *Department of Agriculture*, 831 F.2d 403, 405 (2d Cir. 1987) (same); *Tri-County Wholesale Produce Co.* v. *Department of Agriculture*, 822 F.2d 162, 163 (D.C. Cir. 1987) (per curiam) ("Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices.").

[8] There is little other evidence of Congress's intent. See 88 Cong. Rec. 290 (1942) (introduction of bill by Rep. Fulmer); 88 Cong. Rec. 2519-2520 (1942) (bill passed by the House

b. Against this background, the Secretary interpreted the "implied duty" clause to prohibit commercial bribery. Pet. App. 30a-36a. The Secretary defined commercial bribery as "[T]he 'offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the "gift," be sufficiently influenced by the offer to favor the offeror over other competitors.'" *Id.* at 33a (quoting 2 R. Callmann, *The Law of Unfair Competition, Trademarks and Monopolies* § 49 (3d ed. 1967)). The Secretary observed that commercial bribery has been declared an unfair trade practice under several federal statutes. Pet. App. 33a-34a.[9] Indeed, the Secretary noted, two of its own prior opinions had condemned commercial bribery in a related context. *Id.* at 34a-35a.[10] The Secretary

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with brief comment); 88 Cong. Rec. 3173 (1942) (bill passed by the Senate with no comment).

[9] See, *e.g.*, Section 202 of the Packers and Stockyards Act, 7 U.S.C. 192, *National Beef Packing Co.* v. *Secretary of Agriculture*, 605 F.2d 1167, 1168-1169 (10th Cir. 1979); Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c), *Grace* v. *E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); Section 105(c) of the Federal Alcohol Administration Act, 27 U.S.C. 205(c), *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939).

Contrary to petitioner's assertions, Pet. 14-16, the mere fact that petitioner's conduct may violate other federal and state laws does not indicate that Congress intended that commercial bribery would not be covered by the broad prohibition in Section 499b(4), directed at the breach of "*any* specification or duty, express or implied, arising out of *any* undertaking" in connection with transactions involving perishable agricultural commodities. 7 U.S.C. 499b(4) (emphasis added).

[10] See *Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1042-1043 (1986), aff'd *sub nom. Holiday Food Service, Inc.*

then reasoned that, because "Congress' goal in enacting PACA was to prohibit unfair trading practices in the produce industry," the "implied duty" clause should be read to impose on PACA licensees the duty to refrain from bribing their customers' purchasing agents. *Id.* at 36a.

The court of appeals recognized that PACA leaves substantial discretion to the Secretary to delineate the duties of licensees, Pet. App. 7a, and that "[t]he Secretary has consistently enforced the PACA to ensure that members of the industry deal fairly with one another at arm's length." *Id.* at 8a. The court therefore applied the standard of review announced in *Chevron*, 467 U.S. at 843, and held that the Secretary's construction of PACA is permissible. Pet. App. 8a-10a. See also *Arkansas* v. *Oklahoma*, No. 90-1262 (Feb. 26, 1992), slip op. 15, 18-20. That decision is unassailable. The plain language and legislative history of PACA fully support the Secretary's interpretation of the statute. Further review is unwarranted.[11]

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v. *Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987); *National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-1729 (1977), aff'd *sub nom. National Beef Packing* v. *Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979).

[11] Petitioner contends, Pet. 11, that because Section 499b(4) addresses the "fail[ure] * * * to perform" an express or implied duty, it does not prohibit "affirmative" misconduct such as bribery. But a negative duty—in this case the duty not to bribe—is no less a duty for its negative character, and refraining from the conduct proscribed is just as much a "performance" of that duty. Moreover, in light of the reason for the 1942 amendments to Section 499b(4), it is unlikely that Congress intended that the Secretary would regulate only the omissions of licensees, and not their affirmative misconduct.

Petitioner is also incorrect in claiming, Pet. 12-13, that the Secretary's interpretation of the "implied duty" clause is

2. Nor is review warranted on petitioner's claim, Pet. 17-23, that the Secretary should have proceeded by rulemaking rather than by adjudication. This Court has held that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947)). Indeed, "[a]djudicated cases may and do * * * serve as vehicles for the formulation of agency policies, which are applied and announced therein" and "generally provide a guide to action that the agency may be expected to take in future cases." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766 (1969). See also *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1177-1178 (1991).

Contrary to petitioner's assertion, Pet. 22, the Secretary did consider the choice between announcing its interpretation of PACA by rulemaking or adjudication. An agency regulation states that, "because of the many types of businesses conducted" under PACA, it would be "impracticable to specify in detail all of the duties of" PACA licensees, and therefore the "responsibility is placed on each licensee to fully

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contradicted by the overall structure of the statute. While Congress enacted specific prohibitions in other sections of PACA, it also provided a broad, general prohibition against the failure to perform "*any* specification or duty, express or implied, arising out of *any* undertaking" in connection with a transaction involving perishable agricultural commodities. 7 U.S.C. 499b(4) (emphasis added). Nothing in PACA suggests that the specific prohibitions limit the more general "implied duty" clause. Indeed, as noted earlier, pp. 6-7, *supra*, there is evidence that Congress intended the clause to prevent just such a narrow reading of the statute.

perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act." 7 C.F.R. 46.26. As in *Chenery* and *Bell Aerospace*, the Secretary concluded that the problem of unfair and fraudulent business practices in the agricultural produce industry is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery*, 332 U.S. at 203. Accord *NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 294.[12] That conclusion is reasonable. In short, there is no need for this Court to review whether the Secretary's decision to proceed by adjudication rather than by rulemaking constituted an abuse of discretion. Clearly, it did not.[13]

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[12] Petitioner misapprehends the nature of the problem when he argues, Pet. 19 n.26, that the Secretary was required to proceed by rulemaking because commercial bribery is readily definable and is a foreseeable practice in the produce industry. The problem is not the isolated one of defining or anticipating commercial bribery. Rather, the problem is one of promulgating a comprehensive list of *all* fraudulent and unfair practices that may occur in connection with perishable produce transactions, and that may give rise to a violation of duty under the statute. The Secretary reasonably concluded that that task is impractical. Pet. App. 34a.

[13] Petitioner's reliance, Pet. 21-23, on *Stoller* v. *CFTC*, 834 F.2d 262 (2d Cir. 1987), and *Ford Motor Co.* v. *FTC*, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982), is misplaced. *Stoller* was a case where an agency revised an established standard in the course of adjudication. 834 F.2d at 265-266. *Ford Motor* involved a similar reversal of established practice. 673 F.2d at 1010. Here, the Secretary did not revise an existing standard in interpreting PACA to prohibit commercial bribery; PACA clearly covered unfair practices such as commercial bribery when the Secretary applied the statute to petitioner's conduct.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1162

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IN THE

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October Term, 1991

SID GOODMAN & COMPANY, INC.,

*Petitioner*,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . ii
ARGUMENT . . . . . 1

I. THIS MATTER MERITS THIS COURT'S REVIEW NOW

II. THE ADDITION OF THE IMPLIED DUTY CLAUSE WAS NEVER INTENDED TO PROVIDE THE DEPARTMENT WITH UNRESTRAINED DISCRETION TO REGULATE THE PERISHABLE COMMODITIES INDUSTRY

III. THE DEPARTMENT MUST DO MORE THAN SAY IT HAS COMPLIED WITH CHENERY

CONCLUSION . . . . . 9

## TABLE OF AUTHORITIES


| CASES | Page(s) |
|---|---|
| *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987) | 3 |
| *Patterson v. McLean Credit Union*, 491 U.S. 759 (1986) | 3 |
| *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) | 4 |
| *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) | 2,5 |
| *Sid Goodman & Co., v. United States*, No. 90-2209, slip op. (4th Cir. Oct. 1, 1991) | 4 |
| **STATUTES AND REGULATIONS** | |
| 7 U.S.C. § 499b (4) | 3 |
| 7 C.F.R. § 46.26 | 5 |

No. 91-1162

IN THE

*Supreme Court of the United States*

October Term, 1991

SID GOODMAN & COMPANY, INC.,

*Petitioner*,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI**

## I. THIS MATTER MERITS THIS COURT'S REVIEW NOW

A split in circuit authority is a compelling reason to grant a petition. But, contrary to the government's suggestion (Brief at 4-5), the absence of such a split does not preclude review. It should not in this case. As noted in the Petition (at 9-10), the defense of a PACA license revocation proceeding is a major expense. For some

licensees, it could be a crippling expense. The cost of subsequent judicial appeals may be prohibitive. Because Sid Goodman & Co. has already incurred these expenses, and properly framed the issues, this Court should grant the Petition. To defer review, until a split in the circuits develops, could unnecessarily force many PACA licensees to incur the cost of defending revocation proceedings based on the Department's erroneous interpretation of the implied duty clause.

Petitioner is hard pressed to understand how the Solicitor General can characterize, as of "limited significance" (Brief at 5), a question of statutory interpretation impacting an industry which employs over four million people.[1] The government had it right the first time, when it represented to the Court of Appeals below that this question "is an issue of great importance ... ." Pet. at 8. Similarly, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and its progeny, represent one of the foundations of modern administrative law. It certainly is important to know if this Court continues to believe that administrative agencies must announce new interpretations of statutes "as much as possible" by rulemaking. *332 U.S. at 202*..

## II. THE ADDITION OF THE IMPLIED DUTY CLAUSE WAS NEVER INTENDED TO PROVIDE THE DEPARTMENT WITH UNRESTRAINED DISCRETION TO REGULATE THE PERISHABLE COMMODITIES INDUSTRY

The government argues that the addition by Congress of the implied duty clause was sufficient and intended

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[1] United Fresh Fruit and Vegetable Association, 1991 Annual Report at 1.

to transform a detailed and highly specific licensing scheme into an unlimited prohibition on all "unfair practices" in the perishable agricultural commodities industry. This argument, however, ignores both the plain language of the clause and disregards several fundamental tenets of statutory construction.

The implied duty clause provides that it shall be unlawful for licensees "to fail to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction." *7 U.S.C. § 499b(4)*. The clause does not make the performance of general unfair trade practices unlawful. Had Congress intended to do so, it would have used the "unfair practices" language that it had previously used in subsection (1) of the very same section of PACA. *INS v. Cardozo-Fonseca, 480 U.S. 421, 432 (1987)* ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").[2] Although the government recognizes that other statutes contain general prohibitions on unfair trade practices, it nevertheless argues that the implied duty clause should be recast as an additional prohibition on unfair practices in the perishable agricultural commodities industry. As Petitioner has noted previously, rather than steering the Court toward the government's

[2] The government's reliance on the word "any" in the clause, to overcome the absence of broad unfair practices language, is similarly misguided. The use of "any" to modify "specification or duty" and "undertaking" does not change the fact that only "fail[ures] to perform" such duties are punishable. Nor does it change the fact that Congress chose not to use the "unfair practices" language used elsewhere in the Act.

"tortuous construction" of the PACA, the existence of these other statutes "should deter [the Court] from" doing so. *Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989).* This is true even where the construction would clearly achieve the purposes of the Act in question. *Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989).*[3]

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[3] Contrary to Respondent's assertions, and as government conceeded at oral argument, there is no evidence that Petitioner, Sid Goodman & Co., "marked-up" the price of Offutt melons sold to Magruder above market prices. On the contrary, the record shows that the per-unit prices charged to Magruder for Offutt melons were consistently lower than those charged to some other purchasers. Load Report on M. Offutt & Co. Melons, December 31, 1987 (reprinted in Joint Appendix in *Sid Goodman & Co. v. United States, No. 90-2209, Slip op. (4th Cir. Oct. 1, 1991) at 299-300).* Specifically, on every day that Offutt melons were sold to Magruder, Offutt melons were also sold to other Purchasers at higher per-unit prices. For example, on December 29, 1987, Magruder purchased 32 units of Offutt melons, at $6.00 per unit. On that same day, Capital Produce purchased 45 units of Offutt melons at the higher price of $7.00 per unit. Id.

## III. THE DEPARTMENT MUST DO MORE THAN SAY IT HAS COMPLIED WITH CHENERY

The government argues that the Department's regulation, 7 C.F.R. § 46.26, satisfies *Chenery's* mandate because that regulation recites that it was impossible to announce in advance "all" of the various forms of conduct that might fall within the Department's interpretation of the implied duty clause. Brief at 11, n.12. That approach merely side-steps *Chenery*.

The Department never attempted to list any of the kinds of conduct that it believed would constitute a ground for license revocation under the implied duty clause. In the case of the conduct at issue here, as shown in the Petition (at 19, n. 26), not only was the Department aware of the problem, it had addressed similar conduct, in similar circumstances, by rulemaking. The issue under *Chenery* is not whether all possible implied duties can be defined. It is whether the Department has defined as many "as possible." 332 U.S. at 202. Here, the Department did not even attempt to do so. That was not an abuse of an exercise of discretion. It was a total failure of the Department to exercise its discretion. *Chenery* permits the Department to reserve, as necessary, the ability to proceed by adjudication. In the absence of any evidence that it was "not possible" for the Department to announce, in advance, its "commercial bribery" interpretation of the implied duty clause, it was improper for the Department to do so for the first time in an adjudicatory proceeding.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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